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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

POTT INDUSTRIES INC.,
Petitioner,

vs.

INGRAM RIVER EQUIPMENT, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the current split of authority in the Circuit Courts of Appeals on the substantive federal maritime legal issue of recognizing a product liability tort claim for economic losses attributable to a defective product's failure to perform its intended function in a manner which neither threatened nor caused physical injury should be resolved?

2. Whether federal courts, sitting in admiralty, in product liability cases should follow the common law doctrine adopted by the Restatement of Torts and the overwhelming majority of states which denies a tort — as distinguished from contract — remedy for purely economic losses in the absence of any threat of physical harm to persons or property?

3. Whether, under *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U. S. 249 (1972) and *The Peoples Ferry Co. of Boston v. Jos. Beers,* 61 U. S. (20 How.) 393 (1858), an action for negligent performance of a contract to construct a vessel is within the admiralty jurisdiction of the federal courts?

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PETITION FOR WRIT OF CERTIORARI

Pott Industries Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 756 F.2d 649. The opinion is reprinted as Appendix A to the Petition. The memorandum opinion of the District Court is reported at 573 F. Supp. 898. It is reprinted as Appendix B to the petition.

JURISDICTION

The judgment of the Court of Appeals was entered March 5, 1985. The Court of Appeals denied the petition for rehearing and rehearing *en banc* on April 9, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Pott Industries Inc. ("Pott") owns a shipyard in St. Louis, Missouri which builds towboats and barges for operation on the inland rivers. Ingram River Equipment, Inc. ("Ingram") is the owner and operator of over 50 tank barges, including the four involved in this case, which are used to carry petroleum cargos on the inland river system.

Coils of steel piping called steam coils are somethimes installed as optional equipment in tank barges to facilitate the discharge of heavy petroleum cargos, such as asphalt or unrefined crude oil. The piping is installed in parallel series on the floor of each cargo tank. Intake and discharge pipes are then run vertically some twelve (12) feet to inlet and discharge valves for steam on the deck of the barge.

When the equipment is used, steam is pumped into the coils from the deck inlet and circulated in the piping at the bottom of the tanks to warm the cargo to a more fluid state. Following discharge of the cargo, the condensed water from the steam is supposed to be purged by pumping air through the coils at high pressure.

In March, 1973, Pott and Ingram started negotiations for the construction of four tank barges. One of the barges was to be equipped with a steam coil heating system. Later, it was agreed that all four barges would be built with steam heating coils.

In August, 1974, the parties executed a written contract for the construction of the four barges. Drawings approved in accordance with the contract stipulated that the steam coils would

be constructed with furnace-weld pipe. The furnace-weld pipe used in the steam coils is the same grade of steel as seamless pipe, however, it has vertical seams which are joined together by welding in the manufacturing process while seamless pipe is manufactured in a continuous circumference without a seam. Both types of pipe have been approved by the United States Coast Guard for use in steam coil heating systems in tank barges.

The contract contains several provisions pertinent to this action. In Article IX, Pott gave the following express warranties: (1) the barges will conform to the requirements of the contract documents, the United States Coast Guard and the American Bureau of Shipping; (2) the barges will be of good workmanship and quality; (3) the barges will be free of all defects. Article XVIII provided that the contract was to be governed by Missouri law. It was conceded at trial that Ingram had no claim for breach of any of the express warranties.[1]

Prior to delivery, the barges were successfully tested on several occasions as required by the Coast Guard to insure that the steam coils were watertight and fit for service. Following the tests, Pott purged the coils with air under pressure.

The barges were delivered to Ingram in August and September, 1975. For two years Ingram operated the barges without incident. The parties disputed whether the steam coils were used during this period. Ingram claimed that the barges did not carry the heaviest petroleum products and therefore, steaming was not required. Pott offered testimony of former Ingram employees that at least one of the barges was steamed during 1976.

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[1] The District Court alternatively found Pott liable on an implied warranty of fitness for a particular purpose. However, the Court of Appeals predicated liability solely on the tort of negligence in admiralty and declined to review the implied warranty ruling. Consequently, no express or implied warranty questions are raised by this Petition.

In August, 1977, leaks were discovered in the steam coils in one of the barges when it was undergoing general repairs. The next month the steam coils in all four barges were tested for leaks. Leaks were found in the coils in three of the barges.

The parties stipulated that the leaks were caused by water which had not been purged from the steam coils and subsequently froze and split the coils. Pott contended that the water was present in the coils due to Ingram's failure to properly purge or pump out the coils after steaming. Ingram contended that the water was present and the coils split because Pott (a) negligently designed the coil system in a configuration which prevented all of the water remaining after steaming from being pumped out by high pressure air hoses available at dock facilities, and (b) negligently used furnace-weld pipe instead of seamless pipe. The evidence showed that seamless pipe is rated to withstand higher pressures than furnace-weld pipe before splitting, but that neither will withstand the pressure exerted by freezing water. The District Court found that Pott negligently constructed the steam coils for the foregoing reasons and that Pott was also negligent because it did not test the purging efficiency of - as distinguished from the absence of leaks in - the steam coils before the barges were delivered. App. B at B-8.

The barges were repaired and returned to service in 1978. During 1978, the barges were used to carry heavy petroleum products. Ingram reported several leaks in the coils. Later, Ingram replaced the coils with seamless pipe. The leaking coils caused no damage to persons, property or cargo. Moreover, the leaking coils did not create any risk of physical harm to persons or property. When the coils leaked the water simply flowed into the bottom of the cargo tank and was pumped out periodically when the tanks were purged.

Ingram filed suit in 1979 invoking jurisdiction under both 28 U.S.C. §1333 (admiralty) and 28 U.S.C. §1332 (diversity). The District Court rendered judgment in favor of Ingram for about

$361,000 and prejudgment interest, representing the cost of the 1977 repairs and the subsequent 1978 replacement of the coils. The District Court held Pott liabile under federal maritime law for negligence in the construction and design of the steam coil heating system. App. B at B-8. The District Court alternatively held that Pott breached the implied warranty of fitness for a particular purpose under Missouri's version of the Uniform Commercial Code, but as noted, that issue is not involved in this Petition. App. B at B-11.

The Court of Appeals affirmed the negligence ruling and declined to review the implied warranty holding. The Court of Appeals also affirmed the District Court's ruling that the case fell within its admiralty jurisdiction.

REASONS FOR GRANTING THE WRIT

1. THE EXISTING SPLIT OF AUTHORITY IN THE CIRCUIT COURTS OF APPEALS WITH RESPECT TO SUBSTANTIVE FEDERAL MARITIME LAW SHOULD BE RESOLVED.

A. The Decision Below Creates A Conflict In The Courts Of Appeals With Respect To Whether Economic Losses Caused By A Defective Product Give Rise To A Maritime Tort

The Court of Appeals acknowledged that its decision was in direct conflict with an almost contemporaneous *en banc* decision of the United States Court of Appeals for the Third Circuit in *East River Steamship Corp. v. DeLaval Turbine, Inc.*, 752 F.2d 903 (3d Cir. *en banc* 1985).[2] The Court of Appeals reasoned that the better policy would permit a recovery in tort, at least

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[2] The *East River* decision was published after oral arguments were heard below, but the opinion acknowledges that its holding directly conflicts with *East River*. In this regard the Court below said the "Third Circuit has thus created a conflict with the Fifth, Ninth and Eleventh Circuits and we must choose which line of cases to follow". App A-8. In fact however, only the Third Circuit prior to the opinion below ever squarely considered the policy question of whether a defective product that only results in economic loss is sufficient to sustain a maritime tort claim. As discussed in subpart 1B in the text, *infra*, the Fifth and the Eleventh Circuits decisions do not conflict with the doctrine followed by most states and adopted in §§395 and 402A, Restatement (Second) of Torts, that a defective product does not give rise to a tort claim unless it creates a risk of injury — other than economic losses - to persons or property. The decision from the Ninth Circuit relied on below is too internally contradictory and inexorably related to the rights of commercial fishermen to stand as a binding precedent for the general proposition espoused in the Court of Appeals opinion. Thus, in reality there is a clear cut split between the Eighth and Third Circuits on the substantive admiralty issue presented by this Petition and the remaining Circuits - with the possible exception of the Ninth -could in an appropriate case adopt either Circuit's policy without doing violence to their prior decisions.

where there was a finding of actual negligence which caused the defect in the product to occur. App. A at A-8. The Court held that, in these circumstances, it would be unjust to require the purchaser to bear the loss. App. A at A-8.

By contrast, the Third Circuit in *East River Steamship Corp. v. DeLaval Turbine, Inc., supra,* held that, in an admiralty action, "damage to a defective product is not actionable in tort unless the design defect creates an unreasonable risk of harm to persons or property other than the product itself." *Id.* at 908. The Third Circuit held that the competing policies present in maritime law were no different than those on land and were best expressed in a previous Third Circuit opinion, *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.,* 652 F.2d 1165 (3d Cir. 1981), where it was said:

> Tort law rests on obligations imposed by law, rather than by bargain, and the thrust of §402(A) is that as a matter of public policy a duty should be imposed on manufacturers to "warrant" the safety of their products. The gist of a products liability tort case is not that the plaintiff failed to receive the quality of product he expected, but that the plaintiff has been exposed through a hazardous product, to an unreasonable risk of injury to his person or his property. On the other hand, contract law, which protects expectation interests, provides the appropriate set of rules when an individual wishes a product to perform a certain task in a certain way, or expects or desires a product of a particular quality so that it is fit for ordinary use.

Id. at 1169.

In determining whether tort law should provide a remedy the courts look to the nature of the defect, the manner in which the defect manifested itself and the nature of the risk inherent in the defect. 752 F.2d at 908. Using this test, it is apparent that a tort law remedy was not appropriate. The alleged defect was leaking steam coils. This was clearly a qualitative defect rather than a

safety related one. The defect did not and could not cause sudden or calamitous injury or damage to persons or to the barges or the products they carried. It occurred gradually during the natural operation of the barges. The leaking coils did not manifest themselves in a manner which posed any sort of risk.

Finally, the only damage caused by the leaks were economic losses consisting of the cost of repairing and replacing the steam coils and the loss of use of the barges while the repairs were being performed. Indeed, the Court of Appeals recognized that "the damage to the coils here is an 'economic loss' because it did not occur in a manner dangerous to people or have dangerous consequences." App. A at A-6. Nevertheless, for policy reasons the Court of Appeals held that "the better reasoning supports allowing recovery in tort". App. A at A-8.

B. The Federal Precedents Relied On In The Opinion Below Do Not Support The Proposition That A Defective Product Always Supports A Maritime Tort Claim

The Court of Appeals relied on three cases, two of which the opinion incorrectly characterized as allowing recovery in tort for exclusively economic losses caused by a negligently manufactured product. The third case is an anomalous exception for commercial fishermen and conflicts with every other Circuit which has previously considered the question of strict liability in tort under admiralty law. App. A at A-6.

In *Jig the Third Corp. v. Puritan Marine Ins. Underwriters Corp.*, 519 F.2d 171 (5th Cir. 1975), the first of the three cases, the vessel sank due to a defective propeller shaft. Thus, the requirement of physical damage to property other than the defective product itself before allowing recovery in tort for negligence was met. In *Miller Industries v. Caterpillar Tractor Co.*, 733 F.2d 813 (11th Cir. 1984) the Eleventh Circuit took great pains to underscore the fact that the negligence for which defendant

was found liable was a failure to warn of defects discovered in the product after it had already been sold. *Id.* at 818. The economic loss doctrine was held inapplicable in *Miller* because

> a duty to warn of a product's defects of which the seller becomes aware goes not to the quality of the product that the buyer expects from the bargain, but to the type of conduct which tort law governs as a matter of social and public policy.

Id. at 818.

The Court of Appeals relied primarily on *Emerson G. M. Diesel v. Alaskan Enterprise,* 732 F.2d 1468 (9th Cir. 1984). In *Emerson,* the owner of a commercial fishing vessel recovered damages for lost profits and the cost of repairs incurred when the vessel missed the Alaskan king crab fishing season due to defective reduction gear in the vessel's engine. In affirming a judgment against the defendant on a theory of strict liability in tort, the Ninth Circuit relied exclusively upon its own former decisions—some of which are at odds with other Circuits.

Emerson, while acknowledging that the overwhelming majority of states have followed the doctrine that a tort action for negligence or strict liability cannot be maintained when the only injury caused by the defective product is economic loss, held that in admiralty, the rule was "different." *Id.* at 1472. However, the cases cited by the *Emerson* court simply do not support its conclusion. *Jones v. Bender Welding and Machine Works, Inc.,* 581 F.2d 1331 (9th Cir. 1978) was a failure to warn case in the same vein as *Miller Industries v. Caterpillar Tractor Co., supra.*

The case of *Union Oil Co. v. Oppen,* 501 F.2d 558 (9th Cir. 1974) involved physical damage to aquatic life from an oil spill. The principal issue was not whether the plaintiffs, commercial fishermen, could recover economic losses due to a defective product, but whether they had sufficient proprietary interest in the

damaged property (*i.e.*, aquatic life) to fall within an exception to the rule of *Robbins Dry Dock and Repairs Co. v. Flint*, 275 U. S. 303 (1927). *Cf. State of Louisiana ex rel. Guste v. M/V TESTBANK, 752 F.2d 1019, 1026-27 and n. 10 (5th Cir. en banc* 1985) (remanded for a determination of whether commercial fishermen have a proprietary interest in the fishing beds they harvest). The *Union Oil* case was carefully limited to commercial fishermen whose economic losses were characterized as "of a particular and special nature." 501 F.2d at 570.

Finally, *Emerson* relied upon *Carbone v. Ursich*, 209 F.2d 178 (9th Cir. 1953), in which commercial fishermen were permitted to recover lost profits in admiralty negligence actions because "seamen are the favorites of admiralty and their economic interests [are] entitled to the fullest possible legal protection." *Id.* at 182. *Carbone* has been severely criticized by other courts for its simplistic reasoning and shaky theoretical underpinnings. *See, e.g., Casado v. Schooner Pilgrim, Inc.*, 171 F. Supp. 78 (D. Mass. 1959); *Henderson v. Arundel Corp.*, 262 F. Supp. 152 (D. Md. 1966), *aff'd.*, 384 F.2d 998 (4th Cir. 1967). Thus, *Emerson* like *Carbone* is clearly an exception to the general rule carved out for commercial fisherman. *See, e.g., State of Louisiana ex rel. Guste v. M/V TESTBANK, supra* at 1025 and n. 6.

C. The Decision Below Imposes Broader Liability In Maritime Negligence Actions Than The Eighth And Most Other Circuits Permit In Maritime Strict Liability Actions

Emerson allowed the recovery of the commercial fishermen's purely economic losses on a strict liability theory. Every other Circuit which has incorporated strict liability principles into admiralty law follows §402A of the Restatement (Second) of Torts. *Ocean Barge Transport Co. v. Hess Oil Virgin Islands Corp.*, 726 F.2d 121 (3d Cir. 1984); *Lewis v. Timco Inc.*, 697 F.2d 1252 (5th Cir. 1983), *on rehearing en banc*, 716 F.2d 1425 (5th Cir. *en banc* 1983); *Schaeffer v. Michigan-Ohio Navigation*

Co., 416 F.2d 217 (6th Cir. 1969); *McKee v. Brunswick Corp.*, 354 F.2d 577 (7th Cir. 1965); and *Lindsay v. McDonnell Douglas Aircraft Corp.*, 460 F.2d 631 (8th Cir. 1972). In order to maintain a strict liability claim, §402A requires physical harm to persons or property arising from the sale of a product in a defective condition unreasonably dangerous to the user or his property[3].

Thus, *Emerson* and the decision below conflict in principle with prior decisions of the Third, Fifth, Sixth, Seventh and Eighth Circuits which adopt the economic loss doctrine in the strict liability context. Indeed, as a result of the decision below, the law in the Eighth Circuit allows recovery for purely economic losses if plaintiff pleads a negligence action but denies a recovery if plaintiff pleads a strict liability action. Compare *Lindsay v. McDonnell Douglas Aircraft Corp., supra,* and the opinion below. There is no justification for treating the two tort actions differently. *East River Steamship Corp. v. DeLaval Turbine, Inc.*, 752 F.2d at 908 n.2; Restatement (Second) of Torts §§395 and 402A.

For the foregoing reasons, the opinion of the Court of Appeals below conflicts directly with that of the Third Circuit in *East River Steamship Corp. v. DeLaval Turbine, Inc., supra*[4], and in principle with the prior opinions of the Third, Fifth, Sixth, Seventh and Eighth Circuits in *Ocean Barge Transport Co. v. Hess Oil Virgin Islands Corp., supra, Lewis v. Timco Inc., supra, Schaeffer v. Michigan-Ohio Navigation Co., supra, McKee v. Brunswick Corp., supra,* and *Lindsay v. McDonnell Douglas Aircraft Corp., supra.* These conflicts justify the grant of certiorari to review the judgment below. Moreover, the decision below raises significant and recurring questions of federal law which have not been but should be settled by this Court.

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[3] Restatement (Second) of Torts §395, which addresses the liability of the product manufacturer for negligence, imposes the same requirements of *physical harm* as §402A.

[4] In *East River* strict liability and negligence claims in admiralty were both asserted. The Third Circuit found that absent at least a threat of physical danger, maritime law did not permit recovery of purely economic losses in either a strict liability or negligence action.

2. SUBSTANTIVE FEDERAL MARITIME LAW SHOULD CONFORM WITH THE SUBSTANTIVE TORT LAW OF THE LAND

A. The Decision Below Offered No Persuasive Policy Reasons For Imposing Maritime Tort Liability On Manufacturers For Economic Loss When There Is No Comparable Common Law Remedy

The Court below and the Ninth Circuit in *Emerson* rejected the economic loss doctrine on policy grounds which few other courts have found persuasive. The rule followed in the overwhelming majority of jurisdictions is predicated on Chief Justice Traynor's landmark decision in *Seely v. White Motor Co.*, 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965). In *Seely,* the California Supreme Court held that the law of warranty was the appropriate basis for the recovery of economic loss, stating:

> The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands.

Id. at 18, 45 Cal. Rptr. at 23, 403 P.2d at 151.

Emerson and the Court below articulated four reasons for rejecting the doctrine enunciated in *Seely:* (1) their belief that war-

ranty law did not adequately protect consumers; (2) the existence of the so-called "arbitrary" exception to the economic loss rule which allows recovery of economic losses when accompanied by personal injury or physical damage to property other than the defect in the product; (3) their belief that economic losses are no different from other types of injury; and (4) their belief that the existence of insurance adequately protects the manufacturer against this type of tort liability. 732 F.2d at 1474; App. A at A-6-7. For the reasons explained below, none of these are persuasive policy considerations for admiralty courts to depart from the established parameters of product liability law by subjecting merchants who sell goods for use on ships to tort liabilities for economic losses which are not imposed when the goods are used on land.

First, Ingram like most ship owners is a large commercial entity more than able to protect itself through contractual rights and remedies under the Uniform Commercial Code. Indeed, the Code was designed, in large part, to serve the types of parties involved in maritime disputes. *See Spring Motors Distributors, Inc. v. Ford Motor Co.*, 98 N.J. 555, 489 A.2d 660 (1985), overruling *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965) with respect to commercial entities of relatively equal bargaining power. Prior to *Spring Motors*, the *Santor* decision was the leading case expressing the now almost non-existent minority view that a vendor of a defective product can be held liable in tort even when a plaintiff's only injury is an economic loss. The New Jersey Supreme Court's scholarly opinion in *Spring Motors* explains the historical background and the policy reasons for reversing *Santor* at least when two commercial entities - like Pott and Ingram - have entered into a bilateral sales contract. In part the *Spring Motors Court* said:

> "The cross-pollination between the two jurisdictions (California and New Jersey) continued through our *Santor* decision, which relied on *Greenman*. Five months later, however, when the California court was confronted with

an individual's claim for economic loss resulting from the purchase of a defective truck, that court rejected *Santor* and held that the consumer could not recover in strict liability for economic loss. *Seely v. White Motor Co.* (Parenthetical material added)

* * * *

While rejecting plaintiff's right to recover in strict liability, Chief Justice Traynor observed that the law of sales has been carefully articulated to govern economic relationships between suppliers and consumers. He stated further that strict liability was not intended to undermine the warranty provisions of the U.C.C. but 'to govern the distinct problem of physical injuries.'

* * * *

Over the intervening years, *Seely* has emerged as representing the majority view.

* * * *

Santor, however, has attracted the support of a few jurisdictions.

* * * *

In the present case, which involves an action between commercial parties, we need not reconsider the *Santor* rule that an ultimate consumer may recover in strict liability for direct economic loss. To determine whether a commercial buyer may recover economic loss, however, we must reconsider the policies underlying the doctrine of strict liability and those underlying the U.C.C. Those policy considerations include, among others, the relative bargaining power of the parties and the allocation of the loss to the better risk-bearer in a modern marketing system.

* * * *

In such a context, the imposition of the risk of loss on the manufacturer might lead to price increases for all of its

customers, including individual consumers. *Id.* at 956-57. As between commercial parties, then, the allocation of risks in accordance with their agreement better serves the public interest than an allocation achieved as a matter of policy without reference to that agreement.

* * * *

Allowing Spring Motors to recover from Ford under tort principles would dislocate major provisions of the Code. For example, application of tort principles would obviate the statutory requirement that a buyer give notice of a breach of warranty, *N.J.S.A.* 12A:2-607, and would deprive the seller of the ability to exclude or limit its liability, *N.J.S.A.* 12A:2-316. *In sum, the U.C.C. represents a comprehensive statutory scheme that satisfies the needs of the world of commerce, and courts should pause before extending judicial doctrines that might dislocate the legislative structure."*
(Emphasis added)

489 A.2d 668, 669, 670, 671.

Secondly, contrary to the opinion below, the exception to the economic loss rule is rational and serves to distinguish between responsibility for creating products with qualitative defects which merely defeat commercial expectations and responsibility for creating products which impinge social and public policy by creating an unreasonable risk of harm to persons or property. The former is the logical and traditional function of contract law where the parties are free to allocate their economic risks. The latter is a matter of public concern where sound common law tort principles preclude a party from contracting away responsibility for his actions. *Seely, supra,* 63 Cal. 2d at 9, 45 Cal. Rptr. at 23, 403 P.2d at 151; *Miller Industries v. Caterpillar Tractor Co.,* 733 F.2d at 818; Bertschy, "Negligent Performance of Service Contracts and the Economic Loss Doctrine," 17 *J. Mar. L. Rev.* 249, 266 (1984).

Thirdly, economic injuries are clearly different from personal injuries and property damage. Most courts have had no difficulty in discerning the difference. Economic injuries are not synonymous with the nature of the damages, such as lost profits or cost of repairs, because those may be recovered in tort actions under appropriate circumstances. Rather, economic losses in the context of product liability law are those injuries caused by "qualitative defects which defeat commercial expectations." Bertschy, *supra* at 266. Clearly, the distinction between commercial expectations and physical danger is a fundamental demarcation between tort and contract law and there is no rationale for ignoring the distinction in admiralty.

Finally, the suggestion that insurance can be obtained to protect the manufacturer actually supports the need for preserving instead of discarding the economic loss doctrine in admiralty. Insurance, if available, has a cost that the parties did not bargain for insofar as what are essentially contract damages are concerned. The Uniform Commercial Code affords ample protection, especially to sophisticated commercial entities, for the type of losses suffered here. By recognizing a tort action in negligence for what is in essence a breach of contract, the Court below has imposed the cost of insurance (or its alternative) on one of the parties to the contract irrespective of their allocation of risks and in so doing has jeopardized the continuing viability of the Uniform Commercial Code.

Permitting recovery in tort for purely economic losses leaves a manufacturer in a position of liability unrestrained by contractual disclaimers, liability limitations, notice provisions, differing statutes of limitation, and other contractual protections by which they may attempt to rationally allocate their costs. For example, Pott and Ingram agreed that their contract would be governed by Missouri law. The application of the tort remedy of negligence in admiralty by the Court below defeated the parties' contractual choice of law.

Although the Court of Appeals suggests in its opinion that Ingram would be deprived of a remedy if it were not allowed to recover in admiralty for purely economic losses, this is clearly not so. Ingram retains its express warranty rights under its contract of sale and its implied warranty rights under the Uniform Commercial Code to proceed against Pott. Nothing in either tort or contract law, however, guarantees Ingram a recovery. Admiralty jurisdiction should not be used by the Federal Courts to fashion a substantive body of expanded product liability law which differs from the common law constraints on tort liability recognized on land.

The Court of Appeals offered no persuasive reason to the contrary. As the Third Circuit noted in the *East River* case:

> In defining the contours of products liability doctrine in admiralty law, courts have consistently looked to the law of the land, and have relied upon many of the same policy concerns that underlie the land-based products liability decisions.

752 F.2d at 907 (citations omitted).

B. The Overwhelming Majority Of State Court Decisions and Sound Policy Mandate Conformity Of Substantive Maritime Tort Law With Common Law Principles

If this case involved defective coils in a land vehicle rather than a barge, it is clear that Ingram could not recover in negligence for purely economic losses of the type suffered here. *R. W. Murray Co. v. Shatterproof Glass Corp.*, 697 F.2d 818 (8th Cir. 1983) (Missouri law). This is true not only in Missouri, but also in most of the other states in the nation. See cases collected in *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, 626 F.2d 280, 287-88 n. 13 (3d Cir. 1980); *Spring Motors Distributors, Inc. v. Ford Motor Co.*, 98 N.J. 555, 489 A.2d 660 (1985). See also Appendix D which annotates the state

of the product liability law in each of the fifty states. It shows that of the 34 states which have decided the issue, only 8 might in some circumstances permit a buyer to maintain a tort — as distinguished from a contract — action when the buyer's only injury or threat of injury was an economic loss.

The fear that economic losses will be borne by innocent purchasers is unfounded in this context. The law of warranty provides a full, complete and adequate remedy for claims of defective products which do not cause or create an unreasonable risk of physical injury or physical harm to persons or property. The gravamen of Ingram's complaint is that the heating coils did not perform "a certain task in a certain way." *Pennsylvania Glass and Sand Corp. v. Caterpillar Tractor Co., supra* at 1170. Ingram's negligence claim is merely a breach of contract suit in another guise. The true problem is one of an alleged qualitative defect which defeated Ingram's commercial expectations. This is a contractual claim between two parties in a direct contractual relationship. It in no way implicates the policies served by tort law.

Even the most elementary policy considerations in admiralty dictate conformity of substantive maritime and common law principles in the product liability field. If Pott had installed the steam coils in a railroad tank car instead of a barge the state court decisions demonstrate that Ingram could not have recovered in tort for the negligent design of and choice of materials for the steam coil system. Instead, Ingram's right to recovery would have been governed by contract principles as codified in the Uniform Commercial Code. To adopt different principles of liability in admiralty for land based manufacturers who often supply the identical product to vessels and over the road vehicles merely invites unfavorable cost justified price differentials for products sold to the already distressed maritime industry.

If the admiralty courts are truly concerned as they profess to be with preserving and protecting maritime commerce, it behooves this Court to review a decision which out of a misguid-

ed interest in protecting a particular ship owner has adopted a substantive rule of maritime law that discriminates against manufacturers who supply goods essential to maritime commerce. Such discrimination is certain to have a more adverse effect on the viability of maritime commerce as a whole than the dubious benefit of protecting a few ship owners from economic losses arising out of their often intentional waiver of the adequate contractual remedies provided by the Uniform Commercial Code.

Because of the overwhelming unanimity of state law on this subject and the need for a thorough review of the policies underpinning substantive federal maritime tort law, certiorari should be granted in this case. The fact that there is also a split of authority in the Circuits on the issue of whether a negligently manufactured product that only poses an economic risk will support a maritime tort claim mandates that certiorari be granted.

3. THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT HOLDING THAT DISPUTES ARISING OUT OF THE CONSTRUCTION OF A VESSEL ARE NOT WITHIN THE ADMIRALTY JURISDICTION.

In *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249 (1972), this Court discarded the "locality" rule first promulgated in *The Plymouth* 70 U. S. (3 Wall.) 20 (1895) in which the exercise of admiralty jurisdiction was founded solely upon the locality of the tort. This Court held that the mere fact that the alleged wrong occurred on or over navigable waters was insufficient to establish a maritime tort. The Court concluded that "[i]t is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to a traditional maritime activity." *Id.* at 268. The *Executive Jet* test applies to all occurrences of torts on navigable waters. *Foremost Ins. Co. v. Pansy F. Richardson,* 457 U. S. 668, 673 (1982).

The first prong of the *Executive Jet* test was met. The rupture of the coils apparently occurred after the barges were on navigable waters. Although the alleged negligence occurred on land while the barges were being constructed, the steam coils did not leak until after the barges had been launched.

The dispute centers around whether the wrong bore a significant relationship to traditional maritime activity. The Court of Appeals held that it did because the defective coils directly affected the barges' use in maritime commerce. The Court said that without functioning heat coils, "the barges could not be used effectively to haul heavy petroleum products that require heating before unloading." App. A at A-4.

The difficulty with this position is that the Court focused upon the wrong activity. The alleged negligence arose out of the performance of a contract to build barges. It has long been held that a contract to build entirely new ships is not a maritime contract. *The People's Ferry Co. of Boston v. Jos. Beers,* 61 U. S. (20 How.) 393 (1858). This Court has previously held that, despite criticism,

> the doctrine is now firmly established that contracts to construct entirely new ships are nonmaritime because not nearly enough related to any rights and duties pertaining to commerce and navigation. It is said that in no proper sense can they be regarded as directly and immediately connected with navigation or commerce by water.

Thames Towboat Co. v. The Schooner Francis McDonald, 254 U. S. 242, 244 (1920).

In the *Foremost* case, the Court held that admiralty jurisdiction extended even to non-commercial activities which implicated maritime interests such as safety and navigation or commerce. Neither of these considerations is present here. The defective coils had no effect upon either the navigation or safety of the barges. It is undisputed that the defective coils caused no risk of harm to either persons working on or about the barges or

to the petroleum products that were carried within them. More importantly, the split coils did not and could not effect the barge's ability to navigate on the inland rivers. The defects in the coils merely prevented the coils from functioning efficiently.

In these circumstances, there is no need for the special expertise of a court in admiralty concerning navigation or water based commerce nor is there any federal interest in preserving the uniformity of decisions requiring the application of federal substantive law. *Cf. Owens-Illinois, Inc. v. United States District Court for the Western District of Washington at Tacoma,* 698 F.2d 967, 971 (9th Cir. 1983) (no admiralty jurisdiction over personal injury suit arising from asbestos exposure during construction of a new vessel). Although it is undoubtedly correct that ship construction is clearly essential to the maritime industry, the conclusion that a "tort arising therefrom [has] a significant relationship to traditional maritime activities is not compelled." *Id.* at 971.

Ingram's claim arises specifically from alleged negligence in performing a contract to construct new barges in that it claims that Pott negligently designed and constructed the steam coils. Even pre-*Executive Jet* cases found that negligent construction of equipment used on a vessel was not a maritime activity. *Watz v. Zapata Off-Shore Company,* 431 F.2d 100, 110 (5th Cir. 1970). Ingram's claim can be completely resolved by a determination of the adequacy of the materials and design of the steam coil system. There is no issue of unseaworthiness, cargo damage, maritime liens, salvage, navigation, safety or other threat to water-based commerce. The alleged cause of the injuries was land-based in that the design and the construction of the barges took place on shore.

There are sound policy reasons for declining to extend admiralty jurisdiction to the rights of parties to commercial contracts pertaining to construction of vessels when there is no threat of a maritime injury or accident. A non-negligent breach of a contract to construct a new ship does not fall within the admiralty jurisdiction. For example, in *People's Ferry Co. of*

Boston v. Jos. Beers, supra, the Court held that admiralty lacked jurisdiction over an action for the balance due on a contract to build a new vessel. There is no logical reason why a negligent failure to perform the same contract should fall within admiralty jurisdiction unless it poses some threat to maritime commerce as distinguished from the commercial expectations of the ship owner. The nature of the contract is not transformed by the nature of the breach. The activity which gave rise to the action has no significant relationship to a traditional maritime activity.

The test suggested by the Court of Appeals would convert all post delivery warranty claims arising out of a contract to build a ship into a maritime claim. The Court of Appeals invoked admiralty jurisidiction because the barges could not be used "effectively" to haul heavy petroleum products. This expansive test of effective economic utility could be applied to every component furnished pursuant to a contract to build a vessel. For instance, if the contract called for a cargo capacity of 100,000 gallons and because of negligent design the actual capacity was only 98,000 gallons it would follow that the barge could not be used as "effectively" to haul petroleum products. Thus, the jurisdictional test adopted below has the potential of converting every post delivery contract claim relating to a vessel's performance into a maritime cause of action. If the reasoning of the Court of Appeals is to be adopted, then it would be more logical to overrule the prior decisions holding that contracts to build ships are non-maritime and confer jurisdiction on the admiralty courts to resolve all disputes related to such contracts.

The continued uncertainty engendered by the application of the *Executive Jet* test warrants the grant of certiorari in this case to determine whether the negligent performance of a non-maritime contract falls within the admiralty jurisdiction simply because a component which posed no threat to navigation or safety failed on navigable waters.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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July, 1985

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 84-1371, 84-1424

No. 84-1371

Ingram River Equipment, Inc.,
Appellee,

v.

Pott Industries, Inc.,
Appellant.

No. 84-1424

Ingram River Equipment, Inc.
Appellant,

v.

Pott Industries, Inc.,
Appellee.

Appeals from the United
States District Court
for the Eastern District
of Missouri.

Submitted: November 14, 1984

Filed: March 5, 1985

Before ARNOLD, Circuit Judge, HENLEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

ARNOLD, Circuit Judge.

This case involves claims for damages stemming from the allegedly defective design and construction of heating-coil systems that the defendant Pott Industries, Inc. (Pott), installed in four barges it built for the plaintiff Ingram River Equipment, Inc. (Ingram). The District Court[1] found Pott negligent under federal maritime law and liable for breach of warranty under Mo. Ann. Stat. §400.2-315 (Vernon 1959). It awarded damages of $361,757.00 to Ingram for costs of repair and replacement of the steam-coil systems, plus prejudgment interest of 9% per annum, but denied damages for loss of the use of the barges during the period that they were out of service. We affirm.

I.

In 1973, Ingram contracted with Pott to buy four barges which contained steam-coil systems for heating heavy liquid cargo. (Heavy oil is easier to unload when heated.) Pott, the builder, submitted plans and drawings of the steam-coil systems to Ingram for its approval. Ingram gave its approval, and Pott installed the steam-coil systems using furnace-weld pipe as provided in the plans. In August, 1977, Ingram discovered

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[1] The Hon. H. Kenneth Wangelin, Senior United States District Judge for the Eastern District of Missouri. The District Court's opinion is reported at 573 F. Supp. 896 (E.D. Mo. 1983).

numerous leaks in the steam coils of one of the barges, and, subsequently, in the other three barges. The parties agree that these leaks were most likely caused by freezing water that remained in the coils after steaming.

Ingram had the leaking coils repaired, but following the initial repairs continued to have problems with steam leakage, and decided to replace the entire coil systems in all four barges. Ingram replaced the coil systems with new systems that differed in two significant respects. First, the new systems used seamless pipe, which is stronger than the furnace-weld pipe used in the original systems. Second, the new systems incorporated design changes in coil placement to facilitate removal of condensed water. When Pott refused to pay for the replacement, Ingram brought suit claiming that Pott was negligent and had breached its warranty of fitness by using coil piping that was too weak and by failing to provide an adequate method of draining water left in the pipes.

The District Court held the defendant liable for negligence under federal maritime law and for breach of warranty under Mo. Ann. Stat. §400.2-315 (Vernon 1959). It found that the systems were inadequately designed to purge condensed water out of the coils after they were filled with steam and that the furnace-weld pipe was inadequate to perform its function. It awarded Ingram damages for the repair and replacement of the coils but denied recovery for loss of use of the barges. Pott appeals, claiming, among other things, that the District Court did not have maritime jurisdiction over the negligence claim, and that even if the case sounds in admiralty, federal admiralty law does not allow recovery for economic losses. Ingram cross-appeals from the District Court's denial of damages for loss of use.

II.

The District Court based its finding of maritime jurisdiction under 28 U.S.C. §1333 (1982) on the two-factor test set forth by

the Supreme Court in *Executive Jet Aviation v. City of Cleveland,* 409 U.S. 249 (1972). This test provides that maritime tort jurisdiction exists if the wrong occurred on navigable waters and if the wrong bore a significant relationship to maritime activity. *Id.* at 268.

In this case there is no dispute that the wrong or its result—the ruptured coils—has a marine locality, since the splits in the coils occurred after the barges had been launched. The dispute, rather, centers around whether the wrong bears a significant relation to maritime activity. We believe that it does. Maritime activity has traditionally been viewed as encompassing "maritime service, commerce, or navigation." See, *e.g., Executive Jet,* 409 U.S. at 251, 258, 259, 272. Here the splits in the coils directly affected the barges' use in maritime commerce. Without functioning heating-coil systems, the barges could not be used effectively to haul heavy petroleum products that require heating before unloading.

Pott contends that the purpose of maritime jurisdiction—to provide special maritime-law expertise—is not promoted by invoking maritime jurisdiction in this case. It argues that since Ingram's claim turns on the adequacy of the materials and design of the steam-coil systems, there is no claim requiring the special guidance of admiralty, such as a claim of unseaworthiness, cargo damage, or maritime lien.

The short answer to this argument is that the scope of admiralty jurisdiction is not determined by whether or not a particular case calls for admiralty "expertise." Rather, the Supreme Court in *Executive Jet* fashioned a broader test that for reasons of convenience only indirectly addressed the need for admiralty expertise. It does so by requiring that the alleged wrong bear a significant relationship to maritime activity.

Further, this case does involve the expertise of admiralty courts in some respects. Testimony as to defects in the design of ships and internal components, *e.g.,* a barge heating-coil

system, may in many cases be best evaluated by a court which is familiar, or more likely to be familiar, with maritime cases. In this particular case, in addition to determining whether the heating-coil systems were defective in causing the pipes to split, the court had to determine whether the split pipes made the barges unusable for the purpose of hauling certain cargoes. This determination presumably is best made by a court which is, at least theoretically, more likely to be familiar with maritime conditions.

III.

Pott argues that the repair and replacement of the coils constitutes an "economic loss," and that the common-law doctrine denying tort recovery for economic losses should be applied in admiralty to deny recovery for this damage. This doctrine is part of the common law of Missouri.

The concept of "economic loss" has been given various definitions, but in the present context, it is perhaps best understood, in view of the rationale of the economic-loss doctrine, as referring to damages which do not result from a dangerous or unsafe condition of a product. See, *e.g.*, *Seely v. White Motor Co.*, 63 Cal. 2d 9, 18, 45 Cal. Rptr. 17, 23, 403 P.2d 145, 151 (1965) (Traynor, J.); *Crowder v. Vandendeale*, 564 S.W.2d 879, 881 (Mo. 1978) (en banc) (damage to property sold is an "economic loss" unless that damage was caused by a violent occurence).[2] Typically, economic losses are the costs of repairing or replacing a product and the loss of profits from the use of the product.

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[2] For discussion of the various definitions of "economic loss," see Bertschy, *Negligent Performance of Service Contracts and the Economic Loss Doctrine*, 17 J. Mar. L. Rev. 249 (1984); Note, *Economic Loss in Products Liability Jurisprudence*, 66 Colum. L. Rev. 917 (1966).

The traditional rationale for denying recovery of economic losses is to protect manufacturers from "unlimited and unknown" liability for products that simply fail to perform as anticipated without posing a safety risk. *Seely,* 63 Cal. 2d at 17, 45 Cal. Rptr. at 22-23, 403 P.2d at 150-51. It is argued that the buyer or consumer of a safe product can adequately protect his interest in quality performance through the law of warranty, and that given the possible extent of liability for economic losses, it would be unfair to impose such liability on the manufacturer.

Assuming the damage to the coils here is an "economic loss" because it did not occur in a manner dangerous to people or have dangerous consequences, the question thus arises whether admiralty law recognizes the doctrine of economic loss in negligence cases. We have not yet addressed this particular issue,[3] but most of the other circuits which have addressed it have concluded that the economic-loss doctrine does not apply to bar recovery for maritime negligence.

In *Emerson v. G.M. Diesel, Inc., v. Alaskan Enterprise,* 732 F.2d 1468 (9th Cir. 1984), the court acknowledged that in non-admiralty suits economic losses could not be recovered but then stated: "The rule in admiralty is different. Recovery of economic losses is permitted against a manufacturer of defective goods when liability is based on negligence." *Id.* at 1472 (citation omitted). It stated that the rationale for this rule was that " 'seamen are favorites of admiralty and their economic interests [are] entitled to the fullest possible legal protection.' " *Id.,* quoting *Carbone v. Ursich,* 209 F.2d 178, 182 (9th Cir.

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[3] As Pott points out, we did apply in a maritime case the Restatement (Second) of Torts §402-A, which limits recovery in strict liability to "physical harm" resulting from an "unreasonably dangerous" product. *Lindsay v. McDonnell Douglas Aircraft Corp.,* 460 F.2d 631 (8th Cir. 1972). However, in that case no issue was raised concerning recovery for other kinds of damages.

1953). The court also rejected the economic-loss doctrine on substantive grounds. It questioned the assumption that the recovery of economic losses would unfairly burden manufacturers, since they could insure against such losses. It further stated that many of the exceptions to the doctrine which permit recovery of economic losses if they are accompanied by personal injury or physical damage are arbitrary.[4] *Emerson,* 732 F.2d at 1474.

In *Miller Industries v. Caterpillar Tractor Co.,* 733 F.2d 813 (11th Cir. 1984), the court affirmed an award of damages for lost profits resulting from the defendant's failure to warn the plaintiffs of a faulty engine gear and the potential problems of piston wrist pins. The court held the failure to warn formed the basis for a negligence action under maritime law even though no "physical damage" had occurred.[5] *Id.* at 818. The court based its holding on *Jig the Third Corp. v. Puritan Marine Ins. Underwriters Corp.,* 519 F.2d 171 (5th Cir. 1975). In that case, the *Princess,* a shrimp boat, sank without loss of life or personal injury because of a defective propeller shaft. One of the defendants argued that no recovery should be allowed because the genesis of the relationship between the plaintiff and the defendant was contractual. The court allowed recovery for loss of the ship and its gear on the ground that the seller's liability for

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[4] The court also said that "[e]conomic loss is no different from personal injury or property damage in the sense it is also a loss that is proximately caused by the defendant's conduct." *Emerson,* 732 F.2d at 1471. We agree.

[5] The court earlier stated that "physical damage" was a term of art contemplating an accident " 'involving some violence or collision with external objects.' " *Miller,* 733 F.2d at 817, n.6, quoting Note, *Economic Loss and Product Liability Jurisprudence,* 66 Colum. L. Rev. 917, 918 (1966).

negligence covers any kind of physical harm, even harm to the defective chattel itself.[6] *Id.* at 175.

By contrast, *East River S.S. Corp. v. Delaval Turbine, Inc.*, No. 83-5192 (3d Cir. Jan. 16, 1985) (en banc), holds that no recovery is available in a tort action in admiralty for damages to a defective product itself unless the design defect creates an unreasonable risk of harm to persons or property other than the product itself. The Third Circuit has thus created a conflict with the Fifth, Ninth, and Eleventh Circuits, and we must choose which line of cases to follow. We think the better reasoning supports allowing recovery in tort, at least where, as here, there is a finding of actual negligence, as opposed to a mere defect not resulting from any lack of due care. If a manufacturer is negligent, that is, if its product was not put together with the ordinary care that a reasonably prudent manufacturer should have used, it should pay for the resulting loss. The contrary rule, that the loss should be borne by the innocent purchaser, is unjust, in our opinion. We therefore hold that the economic-loss doctrine does not bar recovery of economic losses in a negligence action under maritime law.[7] Whether sellers and buyers can alter this rule by contract is an issue we need not discuss in the present case.

IV.

Pott also attacks the District Court's factual findings of causation and negligence. It contends that there is insufficient evidence that the use of furnace-weld pipes and the design of the

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[6] Arguably, the damage in *Jig the Third* was not "economic loss," since it resulted from a dangerous condition (the ship's sinking) created by a defect in the defendant's product, but the court in *Miller* interpreted *Jig the Third* as holding that economic loss per se was recoverable in a negligence action under federal maritime law. *Miller*, 733 F.2d at 817-18.

[7] This holding makes it unnecessary to discuss plaintiff's breach-of-warranty theory, which would provide an alternative basis for recovery.

original coils caused the splits. In addition, it contends that the District Court erred in awarding damages for replacing rather than simply repairing the split coils. We disagree.

The plaintiff offered undisputed evidence that furnace-weld pipes were considerably weaker than seamless pipes. It also offered evidence that purging of the pipes with compressed air removed only 70-80 per cent. of the water, and that the water remaining would freeze and cause splits in the pipes. In addition, it showed that no splits occurred after Ingram replaced the original coil systems with new systems using seamless pipe and an altered design to facilitate water drainage. This evidence convinces us there is no clear error in the District Court's finding of causation and negligence, or in its finding that the splitting problem could not be cured by repair, but required the replacement of the entire coil systems.

V.

Ingram cross-appeals, arguing that the District Court erred in denying damages for loss of use of the barges during the time that the pipes leaked. The court denied such damages on the ground that they were speculative. The only evidence that Ingram offered to prove lost business was that some customers made "inquiries" about rates for shipping petroleum during this time. Ingram produced no evidence that any of its customers made offers that it refused because of the unavailability of the barges. We agree with Pott that the District Court did not clearly err in finding this evidence insufficient to make out a claim for loss of use.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 79-947 A (D)

Ingram River Equipment, Inc.,
Plaintiff,

v.

Pott Industries, Inc.,
Defendant.

MEMORANDUM

(Filed Sept. 30, 1983)

This matter is before the Court for a decision after a twelve-day trial on the merits. Since this is an admiralty case and within the Court's maritime jurisdiction under Rule 9(h) of the Federal Rules of Civil Procedure, and 28 U.S.C. § 1333, the Court heard the evidence without a jury. After considering the pleadings, testimony of the witnesses, stipulations of the parties and the various memoranda submitted on behalf of the respective parties, the Court makes the following findings of fact and conclusions of law in accordance with Rule 52 of the Federal Rules of Civil Procedure. Any finding of fact equally applicable as a conclusion of law is adopted as such and, conversely, any conclusion of law applicable as a finding of fact is adopted as such.

Findings of Fact

1. Plaintiff Ingram River Equipment, Inc. (hereinafter Ingram) was and is incorporated under the laws of the State of Delaware having its principal place of business in the State of Tennessee. Defendant Pott Industries, Inc. (hereinafter Pott) was and is incorporated and has its principal place of business in the State of Missouri.

2. Pott is engaged in the business of building boats and barges through its St. Louis ship division. The barges which are the subjects of this action were operated by Ingram Barge Company, a division of Ingram Industries, Inc., under a bareboat charter. Ingram Barge Company has assigned its claim for damages in this cause to plaintiff Ingram.

3. On March 21, 1973, Ingram and Pott entered into a written contract for the construction of four tank barges. The price of construction for the barges was stated as One Million Nine Hundred Sixty Five Thousand Two Hundred Dollars subject to certain escalation charges.

4. The contract originally provided that only one barge, the IB3001B, would have a steam coil system for heating heavy liquid cargo. However, the parties later agreed to include such a system in all four barges.

5. Article IX of the contract contained warranties made by Pott. It provides, in pertinent part, that the barges will: (1) conform to the requirements of contract documents, the U. S. Coast Guard and the American Bureau of Shipping; (2) be of good workmanship and quality; and (3) be free of all defects. The warranty extended for six months after delivery to Ingram.

6. In March, 1975, Pott submitted plans and drawings (including bills of materials) to Ingram providing for the fabrication of the steam coil system with a combination of two-inch Sch. forty and Sch. eighty A.S.T.M. 53 furnace-weld (type "F" pipe), sometimes referred to as "butt weld pipe". Ingram approved the bills of materials calling for the use of furnace-weld pipe. The additional cost of installing the pipe was One Hundred Twenty Two Thousand Three Hundred Dollars ($122,300). The total price paid by Ingram to Pott, including extras and changes for the four barges was Two Million Three Hundred Ten Thousand Four Hundred Nineteen Dollars and Seventeen Cents ($2,310,419.17).

7. The evidence indicates that seamless pipe is considerably stronger than furnace-weld pipe. The A.S.T.M. A-53 standards for two-inch Sch. forty and Sch. eighty furnace-weld pipe required such pipe to withstand hydrostatic fluid test pressures of up to one thousand p.s.i.g. (per square inch) and thirteen hundred p.s.i.g. respectively. The A.S.T.M. A-53 standards for two-inch Sch. forty Grade A seamless pipe require such pipe to withstand hydrostatic test pressures up to twenty three hundred p.s.i.g. The A.S.T.M. A-53 standards for two-inch Sch. forty Grade B seamless pipe requires such pipe to withstand hydrostatic test pressures up to twenty five hundred p.s.i.g.

8. The parties dispute whether defendant represented to plaintiff that furnace-weld pipe would be "just as good as" seamless pipe. The Court finds, however, that Ingram relied upon Pott's reputation as a shipbuilder and that Pott held itself out as an expert in this field. Additionally, Article IV(a) of the contract provides in pertinent part:

> The detailed manner and method of performing work shall be under the control of seller (Pott), buyer (Ingram) being interested only in the results obtained.

9. Seamless and furnace-weld pipes of the same size and made from the same grade of steel are manufactured differently. Seamless pipe is manufactured in a continuous circumference without a seam; furnace-weld has a vertical seam which is joined together by welding in the manufacturing process. The use of both types of pipe and the fabrication of steel coils complies with the regulations of the United States Coast Guard applicable to the design and construction of steam coil heating systems in tank barges. Generally, seamless is more expensive than furnace-weld pipe.

10. Both Ingram and the United States Coast Guard approved the final bills of materials, plans and drawings of the steam coil heating systems in the barges. The heating systems were then installed by Pott in each of the four Ingram barges in con-

formity with the final material specifications, plans and drawings. An Ingram representative was present at Pott's shipyard during construction of the four barges.

11. Prior to delivery, Pott hydrostatically tested the steam coils in each barge and then purged the coils. The United States Coast Guard inspected each barge and issued its Barge Certificate of Inspection for each barge.

12. In August, 1977, splits, cracks and leaks were discovered in a number of the steam coils when one of the barges, IB2702T, was at the Avondale shipyards for hull repairs. The coils had not been used prior to this time because the barges only carried "light" cargo, such as gasoline, that did not require heat to be used to facilitate the pumping process. Ultimately, thirty five splits were found in the coils of barge IB2701L, seventy one splits in the coils of barge IB2702T, and fifty seven splits were found in the coils of a barge IB3001B. Splits were not found in the coils of the IB1501B at that time, although some splits were discovered later. Pott sent representatives to Avondale to examine the pipe after the steam coils had been repaired.

13. Following the initial repairs, Ingram continued to experience problems with leakage from the steam coils. In the Fall of 1978, Ingram decided to replace the steam coils in all four barges and to make certain design changes. Ingram contracted for the work to be done at Avondale after obtaining bids from Pott and Avondale. The barges were kept at Avondale from December 5, 1978 until February, 1979 for replacement of the steam coil system.

14. The parties agree that water freezing in the coils was most probably the immediate cause of the splits, cracks and leaks discovered in the steam coil systems of the Ingram barges. In normal operations, steam is introduced into tank barge heating coils to heat heavy liquid cargo sufficiently to permit the cargo to flow freely for pumping. Following the introduction of steam into the coils, normal operating procedures required that

the coils be purged in order to remove the water accumulated during steaming. The design of the Ingram barges provided for purging by means of blowing compressed air through the coils to discharge the water. Water is also introduced from time to time in steam coils for testing. At other times coils are tested by introduction of air.

15. Both parties have introduced a substantial degree of expert testimony. The expert witnesses have performed numerous tests with different models of the steam coil heating system under a variety of conditions. Despite this impressive array of technical expertise, however, the central issue remains what quantity of water was necessary to rupture the furnace-weld pipe as it was designed in defendants' steam coil heating system.

16. Defendant argues that the pipes had to be substantially full of water before ruptures occurred. If this condition existed, the evidence indicates that regardless of the design of the system or whether seamless or furnace-weld pipe was utilized, the pipes would have burst. Further, defendant contends that the only party possibly responsible for filling the system with water would be the plaintiff. This is necessarily so because defendant hydrostatically tested the pipes only once and both parties have stipulated that the pipes were purged at that time. However, the Court finds that the extent and efficiency of the purging process was never tested by defendant.

17. Plaintiff's position is that the pipes need not have been substantially filled with water to rupture. Plaintiff argues that a relatively small amount of water left in the system could form pockets. These pockets of water would then freeze causing a rupture. However, only that portion of the water closest to the pipes surrounded by the freezing air would freeze, while water closest to the pipes surrounded by the petroleum product would remain liquid and, therefore, harmless to the pipe. This theory explains the apparently random ruptures in the coil since the movement of the barge would cause the water to be collected at various points which would then break when exposed to the

freezing temperatures. Under plaintiff's theory, the efficiency of the purging process, as well as the design of the coils, becomes critical. If the water is not sufficiently purged by compressing air through the system, the pipe will rupture. Plaintiff argues that the purging process is ineffective to remove all of the water because the compressed air simply seeks the path of least resistance and blows over the low points in the pipes. Plaintiff also contends that the design of coils decreased the efficiency of the purging process.

18. The preponderance of the credible evidence indicates that plaintiff's theory is correct. Not only does plaintiff's theory explain the random ruptures in the pipes, it also explains why further ruptures occurred only in the furnace-weld pipes after the pipes were repaired in the Avondale shipyards in 1977. Additional support for this theory is provided by the fact that Ingram experienced no further problems with the barges after recoiling the heating system with seamless pipe and implementing design changes to improve the purging process. The Court therefore finds that defendant was negligent in its design of the steam coil heating system and in its choice of furnace-weld pipe in the construction of the system.

19. With respect to the purging process itself, this Court finds that plaintiff's estimates concerning the amount of water left in the system after purging are more credible. Plaintiff's tests showed that between twenty per cent (20%) to thirty per cent (30%) of the water injected into the pipes remained after purging. The discrepancy in plaintiff's tests is explained by the fact that tests performed within the context of actual operating conditions yielded higher percentages of water retention. Defendant's tests, in contrast, were performed under optimal conditions on land, thus eliminating the rolling motion of an operating barge. Nevertheless, a number of defendant's tests revealed that water was retained in the coils. The Court therefore finds that defendant was negligent in failing to test the purging efficiency of the steam coil heating system.

Conclusions of Law

The Court has jurisdiction of this cause under maritime law. It is undisputed that the steam coils split while the barges were operating on navigable waterways and employed in the business of transporting commerce. Thus, there is maritime locality and a significant relationship to a traditional maritime activity. *See Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249, 268, 93 S.Ct. 493, 505, 34 L.Ed.2d 454, 467 (1972). This is true even though the conduct alleged is negligent construction or defective design and may have occurred ashore. *Jig the Third Corp. v. Puritan Marine Ins. Underwriter Corp.,* 519 F.2d 171, 174 (5th Cir. 1975), *cert. denied* 424 U.S. 954 (1976).

Defendant argues that because the only damage sustained by plaintiff was economic loss, recovery should be denied. Defendant bases this contention on the holding in *R. W. Murray Co. v. Shatterproof Glass Corp.,* 697 F.2d 818 (8th Cir. 1983). In this case, after a review of Missouri law, the Eighth Circuit Court of Appeals ruled that Missouri law requires something more than economic loss, *i.e.,* damage to the property itself to state a cause of action in negligence. The court concluded that there must be personal injury or property damage either to property other than the property sold, or to the property sold when it was rendered useless by some violent occurrence. *Id.* at 828-29.

Missouri law thus delineated, this Court must determine whether it should be applied in a tort action grounded in maritime law. One of the basic precepts of maritime law is that it is a federal law and, thus, should be applied in a uniform manner. *Lindsay v. McDonnell Douglas Aircraft Corp.,* 460 F.2d 631 (8th Cir. 1972). It has been held that negligent construction of a vessel states a claim under maritime law. *See Jig the Third Corp. v. Puritan Martine Ins. Underwriter Corp.,* 519 F.2d 171, (5th Cir. 1975). Moreover, a number of courts have agreed that negligent repair of a vessel states a claim for

negligence under maritime law. *See, e.g., General Intermodal Logistics v. Main Stream Shipyards,* 666 F.2d 129 (5th Cir. 1982); *Alcoa S.S. Co. v. Charles Ferran & Co.,* 383 F.2d 46 (5th Cir.), *cert. denied* 393 U.S. 836 (1967); *Houston-New Orleans, Inc. v. Page Engineering Co.,* 353 F. Supp. 890 (E.D.La. 1972).

The Court has considered the interest of Missouri in having the contract considered under its laws, but finds that the need for uniformity in federal maritime law is overriding. Therefore, Missouri law restricting negligence actions to those situations where damages other than economic loss is alleged cannot be followed.

Plaintiff in this cause alleges that defendant negligently designed the steam coil heating system of the Ingram barges in that the coils could not be properly purged. Negligent design of a vessel states a claim under maritime law. *Sears, Roebuck & Co. v. American President Lines, Ltd.,* 345 F. Supp. 395 (N.D. Cal. 1971). Plaintiff has also alleged that defendant failed to use proper care in the material chosen to construct the heating system, *i.e.,* the use of furnace-weld pipe. This also has been acknowledged as stating a cause of action under maritime law. *See Jig the Third Corp. v. Puritan Marine Ins. Underwriter Corp.,* 519 F.2d 171 (10th Cir. 1975). The Court has found that plaintiff has sustained its burden of proof in this matter and, accordingly, finds for plaintiff on this count of his claim.

Plaintiff has also alleged and proven that defendant failed to adequately test the purging procedure whereby condensate was to be removed from the steam coil heating system. Defendant had this duty. *Watz v. Zapata Off-shore Co.,* 431 F.2d 100, 119 (5th Cir. 1970).

Plaintiff also contends that the Court should find defendant strictly liable in its construction of the Ingram barges. The Court cannot agree with this assertion. A number of Circuits, including the Eighth Circuit, have expressly recognized the doctrine of strict liability as a part of federal maritime law. *See e.g.,*

Pan Alaska Fisheries, Inc. v. Marine Const. & Design Co., 565 F.2d 1129 (9th Cir. 1977); *Lindsay v. McDonnell Douglas Aircraft Corp.*, 460 F.2d 631 (8th Cir. 1972); *Shaeffer v. Michigan-Ohio Navigation Co.*, 416 F.2d 217 (6th Cir. 1969); *McKee v. Brunswick Corp.*, 354 F.2d 577 (7th Cir. 1965). However, two elements of strict liability as it is stated in § 402(a) of the Restatement of Torts and as it has been developed in the Circuit Court decisions are that the product be unreasonably dangerous and that physical harm occur. These conditions are not extant in the present cause. Therefore, strict liability will not provide plaintiff with an alternative theory of recovery.

The second count of plaintiff's complaint sounds in contract theory. Plaintiff argues that defendant breached an implied warranty of fitness for a particular purpose. Mo. Rev. State. § 400.2-315 states:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods will be fit for such purpose.

Furthermore, any exclusion or modification of the warranty of fitness must be in writing and conspicuous. Mo. Rev. Stat. § 400.2-316.

Two provisions of the contract between the parties are particularly pertinent with regard to this count of plaintiff's claim. The first provision, in Article 4(a), states:

> The detailed manner and method of performing work shall be under the control of seller (Pott), buyer (Ingram) being interested only in the results obtained.

From this provision, it is clear that plaintiff relied upon defendant's judgment in selecting suitable material for the construction of the steam coil heating system. The second provision, in

Article 9 of the contract, created the warranties between the parties. It stated only that the barges would conform to certain minimum objective requirements, be of good workmanship and quality, and be free of all defects. It does not exclude any implied warranties.

Plaintiff cites *Singer Co. v. E. I. du Pont de Nemours & Co.*, 579 F.2d 433 (7th Cir. 1978), as support for its proposition that plaintiff breached its implied warranty of fitness. In this case, the defendant, duPont, contracted to provide plaintiff *Singer* with paint for an electro-disposition paint system. The paint provided failed to adequately perform its function and both the trial court and the appellate court ruled that the defendant had breached its implied warranty of fitness.

Defendant argues that *Singer* is not controlling in this cause because the furnace-weld pipes supplied to plaintiff were not intended for a particular purpose. The Court cannot agree with this contention. Defendant did not simply provide pipe for plaintiff, it provided pipe to be used in a steam coil heating system. Such a system requires the pipe to withstand a severe increase in temperature when the coils are heated by steam to facilitate the transfer of cargo, and a dramatic drop in temperature when the pipes are not being used and the vessel ventures into colder climates during winter. The pipe must also be able to withstand great pressure when steam is introduced into the system and when the condensate is purged from the system by means of high pressure air. The pipe therefore had to be manufactured with these characteristics in mind to adequately serve its intended purpose.

Defendant can hardly argue that it was unaware of the purpose of the pipe because defendant constructed the barges. Moreover, under the terms of the contract, defendant cannot convincingly argue that plaintiff did not rely on defendant's skill in choosing the material. Defendant's choice of material, as already noted, failed to function adequately for its particular

purpose as a steam coil heating system. Thus, this Court concludes that defendant breached its implied warranty of fitness.

Plaintiff also argues that defendant breached an implied warranty of merchantability. The Court disagrees. Mo. Rev. Stat. § 400.2-316, comment 9, states:

> The warranty of merchantability in such a transaction, however, must be considered in connection with the next section on the cumulation and conflict of warranties. Under paragraph (c) of that section in case of such an inconsistency the implied warranty of merchantability is displaced by the express warranty that the goods will carefully comply with the specifications.

Mo. Rev. Stat. § 400.2-317(c) states:

> Express warranties displace inconsistent implied warranties other than a warranty for a particular purpose.

A portion of the express warranty stated that the barges would conform to the requirements of contract documents. Thus, this express warranty would displace the warranty of merchantability, but not the warranty of fitness for a particular purpose analyzed above.

Plaintiff also brings a claim under express warranty. Plaintiff alleges that Anthony Tobin, defendant's Vice President of Sales, had stated that furnace-weld pipe was "just as good" as seamless pipe. Plaintiff argues that this statement became part of the basis of the bargain and must be considered an express warranty. *Community Television Services v. Dresser Industries,* 586 F.2d 637, 640 (8th Cir. 1978). Defendant vigorously disputes that Tobin ever made such a statement.

The Court cannot agree with plaintiff's contention. In *Community Television,* the court found that a written sales catalogue circulated by the defendants and stating that its "television towers would safely withstand the maximum wind velocities and

ice loads to which they are likely to be subjected", created an express warranty beyond that stated in the contract. Although somewhat analogous to the present cause, the Court cannot find that a statement allegedly made by one of defendant's officers while the barges were already being constructed could rise to the level of an express warranty. Therefore the Court does not find defendant liable under a violation of express warranty.

Plaitniff sues for the cost of the initial repairs at Avondale, the cost of the subsequent recoiling of the barges, the loss of use of the barges while they were being repaired, and for prejudgment interest.

Defendant argues that Ingram had a duty to minimize the cost of correcting the situation and cites cases in support of its proposition. *Todd Shipyards Corp. v. Turbine Service, Inc.*, 467 F.Supp. 257 (E.D. La. 1978); *Monsanto Co. v. Port of St. Louis*, 350 F. Supp. 502 (E.D. Mo. 1972). Defendant contends that simple repairs would have been sufficient to correct the situation. However, because the Court has found that the design and the material were negligently defective, defendant's contention is irrelevant. All of the barges would necessarily have to be recoiled to eliminate these defects.

The Court finds that plaintiff's proof for loss of use of the barges during the time that they were being recoiled at Avondale is too speculative to be awarded. Plaintiff's witness in this regard Mr. Val Slicho, Vice President in charge of Petroleum Sales and Transportation, testified that Ingram had received inquiries for rate quotes on a New Orleans to Pittsburgh trip. Based on these inquiries and using the "going rate" of 5.5 mils per ton miles, Mr. Slicho arrived at the figure for loss of use.

The standard for determining loss of use is too rigid to warrant allowing a judgment on such speculative opinion. In *Cargill, Inc. v. Taylor Towing Service, Inc.*, 642 F.2d 239 (8th Cir. 1981), the court noted that:

> To warrant a recovery for lost profits, the plaintiff must present proof sufficient to bring the issue outside the realm of conjecture, speculation or opinion unfounded on definite facts. (citations omitted). As an element of recoverable damages, the sufficiency of the evidence of lost profits is dependent upon whether the financial information contained in the record is such that a just or reasonable estimate can be drawn.

Id. at 241. The record simply fails to offer sufficient proof in this cause to justify an award for loss of use.

Prejudgment interest will be awarded. Prejudgment interest is awarded whenever damages lawfully due are withheld absent a showing of exceptional circumstances that would justify the refusal. *Id.* at 242.

In conclusion, the Court finds that plaintiff has proven its claim in maritime tort for negligent design of the steam coil heating system; negligent choice of material for construction of the system; negligent failure to test the purging capacity of the system; and for a breach of the warranty of fitness for a particular purpose. Accordingly, judgment will be for plaintiff.

Dated this 30th day of September, 1983.

/s/ H. Kenneth Wangelin
United States District Judge

IN THE UNITED STATES COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 79-947 A (D)

Ingram River Equipment, Inc.,
Plaintiff,

v.

Pott Industries, Inc.,
Defendant.

ORDER

(Filed Sept. 30, 1983)

In accordance with the Memorandum of this Court filed this date and incorporated herein.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff Ingram River Equipment, Inc. shall have judgment against defendant Pott Industries, Inc. in the amount of Three Hundred Eighty Four Thousand Two Hundred Seventy Six Dollars ($384,276); and

IT IS FURTHER ORDERED that costs in this action shall be assessed against defendant Pott Industries, Inc.

Dated this 30th day of September, 1983.

/s/ H. Kenneth Wangelin
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 79-947 A (D)

Ingram River Equipment, Inc.,
Plaintiff,

v.

Pott Industries, Inc.,
Defendant.

NUNC PRO TUNC ORDER

(Filed Oct. 1, 1983)

This matter is before the Court upon plaintiff's motion for a Nunc Pro Tunc Order pursuant to Rule 60(a) of the Federal Rules of Civil Procedure.

In this Court's Order and Judgment dated September 30, 1983, the Court inadvertently omitted the award of prejudgment interest and the rate of that interest. Accordingly,

IT IS HEREBY ORDERED that in the second full paragraph of the Order of September 30, 1983, the following words be and are added after the words and figure "Three Hundred Eighty Four Thousand Two Hundred Seventy Six Dollars ($384,276.00)":

> with pre-judgment interest at the rate of nine per cent (9%), said pre-judgment interest to run from the date or dates that payment was made by Ingram River Equipment, Inc., for the damages herein awarded.

Dated this 19th day of October, 1983.

/s/ H. Kenneth Wangelin
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 79-947 C (D)

Ingram River Equipment, Inc., a corporation,
Plaintiff,

vs.

Pott Industries, Inc., a corporation,
Defendant.

MEMORANDUM AND ORDER

(Filed February 21, 1984)

This matter is before the Court upon defendant's motion for a Nunc Pro Tunc Order pursuant to Rule 60(a) of the Federal Rules of Civil Procedure.

IT IS HEREBY ORDERED that in the second full paragraph of the order dated September 30, 1983, the following words be and are changed from "Three Hundred Eighty Four Thousand Two Hundred Seventy Six Dollars ($384,276.00)" to "Three Hundred Sixty One Thousand Seven Hundred Fifty Seven Dollars ($361,757.00)".

Dated this 21st day of February, 1984.

/s/ H. Kenneth Wangelin
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1371/1424EM

September Term, 1984

Ingram River Equipment, Inc.,
Appellee,

v.

Pott Industries, Inc.,
Appellant.

Appeal from the United States
District Court for the
Eastern District of Missouri

JUDGMENT

(Filed March 5, 1985)

This appeal from the United States District Court was submitted on the record of the said District Court, briefs of the parties and was argued by counsel.

After consideration of the premises, it is ordered and adjudged that the judgment of the District Court is hereby affirmed in accordance with the opinion of this Court.

March 5, 1985

Costs of appellee/cross-appellant
for briefs for recovery from
appellant/cross-appellee: $105.60

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

4/19/85

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 84-1371/1424-EM

September Term, 1984

Ingram River Equipment, Inc.,
Appellee/Cross Appellant,

v.

Pott Industries, Inc.,
Appellant/Cross appellee.

Appeals from the United States
District Court for the
Eastern District of Missouri

Appellant/cross appellee's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

April 9, 1985

APPENDIX D

Fifty State Survey: Recovery of Economic Losses in Tort Actions

In this Appendix Petitioner has attempted to locate the most significant federal diversity or state court decision with respect to the product liability law in each of the fifty states on the subject of recovering economic losses caused by a defective product in a tort action. With some exceptions, the courts do not distinguish between negligence and strict liability claims in permitting or denying recovery for purely economic losses in tort. The substantive requirement of risk of physical harm should be a prerequisite to maintaining either tort claim. Compare §§395 and 402A of the Restatement of Torts (Second).

In all of the states, economic losses caused by a defective product are recoverable in contract actions under the contract of sale or under implied warranty theories pursuant to the Uniform Commercial Code. Such contract claims are usually much easier to prove than a tort claim particularly for negligence. However, the parties frequently by the terms of the contract of sale have allocated their risks by limiting the extent of the seller's responsibility for a defective product. Common examples are provisions limiting the seller's obligation to a duty to repair or replace the defective product and disclaimers of responsibility for consequential damages or for products which fail after a year of satisfactory service. Since such limitations are seldom found to restrict the amount of damages a plaintiff can recover if permitted to pursue a tort claim, federal diversity and state courts are frequently confronted with complaints which attempt to plead a tort claim - usually negligence or strict liability - predicated solely on the failure of a product to perform properly without posing any risk of physical harm to persons or property.

A. Majority View: Where Plaintiff's Only Loss Is An Economic Loss, There Is No Recovery In Tort

The majority view is represented by those states which would apply the *Seely* doctrine to the facts of this case. Several of the

majority states would allow recovery when the defective product is damaged by a sudden or violent occurrence — such as a fire. While recovery of economic losses would be denied in such circumstances by Courts which strictly adhere to *Seely,* this distinction is unimportant in this case.

ALASKA

No tort recovery for direct economic loss.

R. Morrow v. New Moon Homes, Inc., 548 P.2d 279, 284-86 (Alaska 1976)

ARIZONA

Where economic loss, in the form of repair costs, diminished value, or lost profits is the plaintiff's only loss, the policies of the law will generally be best served by leaving the parties to their commercial remedies.

Salt River Project Agr. Improvement & Power District v. Westinghouse Electric Corp., 694 P.2d 198, 209-10 (Ariz. *en banc* 1984)

CALIFORNIA

No tort recovery for economic losses.

Seely v. White Motor Co., 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (*en banc* 1965)

COLORADO

No tort recovery under a strict liability theory for commercial or business loss.

Hiigel v. General Motors Corp., 544 P.2d 983, 989 (Colo. *en banc* 1976)

DELAWARE

No tort recovery for pecuniary losses that result from poor workmanship in the absence of an accident, collapse or explosion.

Crowell Corp. v. Topkis Const. Co., 280 A.2d 730, 732 (Del. Super. Ct. 1971)

FLORIDA

No negligence recovery for economic loss.

GAF Corp. v. Zack Co., 445 So.2d 350, 351-52 (Fla. App. 1984)

GEORGIA

No tort recovery for economic losses arising from injury to the product the defendant sold.

Long v. Jim Letts Oldsmobile, Inc., 135 Ga. App. 293, 217 S.E.2d 602, 604-05 (1975)

Mike Bajalia, Inc. v. Amos Const. Co., Inc., 145 Ga. App. 225, 235 S.E.2d 664, 665 (1977)

IDAHO

No negligence recovery for loss of bargain.

Clark v. International Harvester Co., 99 Idaho 326, 581 P.2d 784, 790-94 (1978)

ILLINOIS

No negligence recovery for economic loss.

Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 435 N.E.2d 443, 451-52 (1982)

INDIANA

Loss of bargain not recoverable in negligence action.

Sanco, Inc. v. Ford Motor Co., 579 F. Supp. 893, 895-97 (S.D. Ind. 1984)

IOWA

No tort recovery for economic loss.

Midland Forge, Inc. v. Letts Industries, Inc., 395 F. Supp. 506, 514-15 (N.D. Iowa 1975) (predicting result Iowa Supreme Court would reach)

KANSAS

Kansas is classified in the majority because it has recently determined that in the absence of physical harm a remote pur-

chaser of a defective product cannot even maintain an implied warranty action against the manufacturer for economic losses. It seems clear from the opinion that the Kansas Supreme Court would apply the same rationale in a tort action.

Professional Lens Plan, Inc. v. Polaris Leasing Corporation, 234 Kan. 742, 675 P.2d 887 (1984)

MARYLAND

No tort recovery for economic loss.

Copiers Typewriters Calculators, Inc. v. Toshiba Corp., 576 F. Supp. 312, 326 (D. Md. 1983) (predicting result Maryland Supreme Court would reach)

MASSACHUSETTS

In absence of personal injury or physical damage to property, the negligent supplier of defective products is not ordinarily liable in tort to a purchaser for simple pecuniary loss caused by defective or inferior merchandise.

Marcil v. John Deere Indus. Equip. Co., 403 N.E.2d 430, 433-34 (Mass. App. 1980)

MINNESOTA

Economic losses arising out of commercial transactions, except those involving personal injury or damage to other property, are not recoverable under a negligence theory.

Superwood Corp. v. Siempelkamp Corp., 311 N.W.2d 159, 161-63 (Minn. 1981)

MISSOURI

Recovery in tort is limited to cases in which there has been personal injury, or property damage to property other than the property sold or to the property sold when it was rendered useless by some violent occurrence.

M. Crowder v. Vandendeale, 564 S.W.2d 879, 881 (Mo. *en banc* 1978)

R. W. Murray Co. v. Shatterproof Glass Corp., 697 F.2d 818, 827 (8th Cir. 1983)

NEBRASKA

Loss of bargain, including damage to the product itself and to other property is not recoverable in tort.

National Crane Corp. v. Ohio Steel Tube Co., 213 Neb. 782, 332 N.W.2d 39, 42-44 (1983)

Hawkins Const. Co. v. Matthews Co., Inc., 190 Neb. 546, 209 N.W.2d 643, 653 (1973)

NEVADA

No tort recovery for indirect economic loss.

Local Joint Executive Board of Las Vegas Culinary Workers Union, Local No. 226 v. Stern, 98 Nev. 409, 651 P.2d 637, 638 (1982)

NEW JERSEY

No recovery for economic loss in tort action between two *commercial entities.*

Spring Motors Dist., Inc. v. Ford Motor Co., 98 N.J. 555, 489 A.2d 660, 670-71 (1985) (Reversing *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A2d 305 (1965) at least insofar as mercantile parties are concerned)

NEW YORK

No recovery for direct economic loss in strict liability action.

John R. Dudley Const. v. Drott Mfg. Co., 66 A.D. 2d 368, 412 N.Y.S.2d 512, 514-16 (1979)

NORTH DAKOTA

Direct economic loss is not recoverable in a strict liability tort action.

Hagert v. Hatton Commodities, Inc., 350 N.W.2d 591, 594-95 (N.D. 1984)

PENNSYLVANIA

No tort recovery for damages resulting from qualitative defects.

Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165, 1167-76 (3rd Cir. 1981) (predicting result Pennsylvania Supreme Court would reach)

RHODE ISLAND

No tort recovery for purely economic losses.

Hart Engineering Co. v. FMC Corp., 593 F. Supp. 1471, 1481-85 (D.R.I. 1984) (predicting result Rhode Island, Pennsylvania and Massachusetts Supreme Courts would reach)

SOUTH CAROLINA

When a loss results from mere product ineffectiveness, it is the law of contracts and commercial transactions, rather than strict products liability, which fixes responsibility for the loss.

Purvis v. Consolidated Energy Products Co., 674 F.2d 217, 221-231 (4th Cir. 1982) (predicting result South Carolina Supreme Court would reach)

WEST VIRGINIA

A plaintiff can recover for economic loss in a tort action only if it is caused by a violent or sudden accident.

Star Furniture Co. v. Pulaski Furniture Co., 297 S.E.2d 854, 857-860 (W.Va. 1982)

B. Minority View: Purely Economic Losses May Be Recoverable In Tort

The smattering of states expressing the minority view are not very analytical and appear to involve some peculiarities native to their own jurisprudence. Ohio and Michigan for instance recognize a tort called breach of implied warranty. It, of course, would make no difference if the form of action is labeled contract or tort so long as the substantive rules are governed by Uniform Commercial Code instead of strict liability or negligence principles. Their decisions do not answer the latter question. Notwithstanding the Restatement, Texas, Utah and Oregon distinguish between negligence and strict liability and Utah appears to classify deterioration of the defective product

as property damage in an effort to stay within the rubric of Restatement §§402A and 395. Montana, Washington and Wisconsin have followed *Santor*. However, their decisions were reached before the New Jersey Court reversed *Santor* in a commercial setting.

MICHIGAN

Loss of bargain is recoverable in a tort action based on breach of an implied warranty.

Cova v. Harley Davidson Motor Co., 26 Mich. App. 602, 182 N.W.2d 800, 801-811 (1970)

MONTANA

Loss of bargain is recoverable in a strict liability action.

Thompson v. Nebraska Mobile Homes Corp., 647 P.2d 334, 336-338 (Mont. 1982)

OHIO

Loss of bargain is recoverable in a tort action based on breach of an implied warranty.

Iacono v. Anderson Concrete Corp., 42 Ohio St. 2d 88, 326 N.E.2d 267, 271 (1975)

OREGON

Plaintiff can recover foreseeable economic losses in a negligence action.

Russell v. Ford Motor Co., 281 Or. 587, 594-96, 575 P.2d 1383, 1386-88 (1978)

TEXAS

While loss of bargain is not recoverable in strict liability action, it is recoverable in a negligence action.

Nobility Homes of Texas, Inc. v. Shivers, 557 S.W.2d 77, 83 (Tex. 1977)

UTAH

Damages resulting from product's deterioration are recoverable in a negligence action.

W.R.H., Inc. v. Economy Builders Supply, 633 P.2d 42, 44-46 (1981)

WASHINGTON

Economic loss is recoverable in a tort action.

Berg v. General Motors Corp., 87 Wash. 2d 584, 555 P.2d 818, 823 (*en banc* 1976)

WISCONSIN

Economic losses are recoverable in a tort action unless public policy considerations intervene.

A. E. Investment Corp. v. Link Builders, Inc., 62 Wis. 2d 479, 214 N.W.2d 764, 770 (1974)

C. States Which Have Not Decided The Issue

No published authority was found in the following states giving a clear indication of their view of the recoverability of economic losses in a tort action. Arkansas has not been included in this survey since it has adopted a products liability statute, Ark. Stat. Ann. §85-2-318.2.

Alabama	New Mexico
Connecticut	North Carolina
Hawaii	Oklahoma
Kentucky	South Dakota
Louisiana	Tennessee
Maine	Vermont
Mississippi	Virginia
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No. 85-12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

POTT INDUSTRIES INC.,
Petitioner,

vs.

INGRAM RIVER EQUIPMENT, INC.,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Does a Court have jurisdiction in admiralty of a tort action to recover damages for economic loss, against a shipbuilder whose negligence, in the design, use of materials, and failure to test the purging capacity of a steam heating system in tank barges constructed to transport heavy grades of petroleum products, caused fractures and leaking coils, necessitating repair and replacement of the entire coil system?

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BRIEF OF RESPONDENT IN OPPOSITION

Because the decision of the United States Court of Appeals for the Eighth Circuit in this case follows applicable rulings of this Court and involves none of the criteria warranting review, Respondent Ingram River Equipment, Inc. ("Ingram")[1] respectfully requests that this Court deny the petition of Pott Industries, Inc. ("Pott") for a writ of certiorari.

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[1] Ingram is a wholly-owned subsidiary of Ingram Industries, Inc., a privately owned corporation. It does not believe it has any subsidiaries or affiliates within the meaning of Supreme Court Rule 28.1.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported as *Ingram River Equipment, Inc. v. Pott Industries, Inc.*, 756 F.2d 649 (8th Cir. 1985). The Eighth Circuit affirmed the decision of the United States District Court for the Eastern District of Missouri, reported at 573 F.Supp. 896 (E.D. Mo. 1983). The two opinions appear as Appendix A-1 and B-1, respectively, to the petition for a writ of certiorari.

STATEMENT OF THE CASE

Petitioner seeks review of a decision holding that a Court has jurisdiction in admiralty of a negligence action against Pott, a shipbuilder whose improper design, use of unsuitable pipe, and failure to test the purging capacity of the steam heating system installed in tank barges caused damage to its customer, Ingram, consisting of the expense of repairing the fractured and leaking coils and then replacing the entire coil system.

I. The Facts.

Pott built for Ingram four tank barges which were designed to transport heavy grades of petroleum products. A steam coil system was installed in each vessel, because the cargo required heating for unloading. After the vessels were launched and placed in service, numerous fractures were discovered. At first, Ingram had the leaking coils repaired. When the problem continued, the entire coil systems were replaced with seamless steel, which is stronger than furnace-weld pipe used in the original construction. Design changes were also made to facilitate removal of condensed water.

Ingram sued Pott to recover the expense involved, lost profits, and prejudgment interest.

II. Opinion Of The District Court

The parties agreed that the leaks were most likely caused by freezing water that remained in the coils after steaming. Following a twelve day trial on the merits, the District Court held it had jurisdiction in admiralty of the cause of action for a maritime tort. Pott was found "negligent in its design of the steam coil heating system and in its choice of furnace-weld pipe in the construction of the system" and "negligent in failing to test the purging efficiency of the steam coil heating system." (573 F.Supp. 900, Findings of Fact, pars. 18, 19, Pet. B-6)

The District Court also concluded that Pott "breached its implied warranty of fitness" for a particular purpose under Missouri Annotated Statutes, Section 400.2-315 (Vernon 1959), in that the systems were inadequately designed to purge condensed water out of the coils, after they were filled with steam, and the furnace-weld pipe was inadequate to perform its function. (573 F.Supp. 902, Pet. B-9-11)

The District Court found the evidence insufficient to support Ingram's claim for loss of profits (573 F.Supp. 902-3, Pet. B-12-13) and entered judgment for the recovery of repair and replacement expenses in the sum of $361,757.00, plus prejudgment interest and costs. (Pet. B-16).

III. Opinion Of The United States Court Of Appeals For The Eighth Circuit

The Eighth Circuit affirmed the conclusion of the District Court on the issue of jurisdiction, noting that the case met the "two-factor test set forth by the Supreme Court in *Executive Jet Aviation v. City of Cleveland,* 409 U.S. 249 (1972)":

> In this case there is no dispute that the wrong or its result - the ruptured coils - has a marine locality, since the splits in the coils occurred after the barges had been launched.

Moreover, the wrong bore a significant relationship to maritime activity. As the court observed:

> Here the splits in the coils directly affected the barges' use in maritime commerce. Without functioning heating coil systems, the barges could not be used effectively to haul heavy petroleum products that require heating before unloading. (756 F.2d 651, Pet. A-4).

The Court found that the evidence supported the conclusion of the District Court on causation, negligence and damages. (756 F.2d 653-4, Pet. A-8-9). It rejected Pott's argument that the Missouri common law doctrine denying recovery for economic loss alone should be applied in admiralty:

> We think the better reasoning supports allowing recovery in tort, at least where, as here, there is a finding of actual negligence, as opposed to a mere defect not resulting from any lack of due care. If a manufacturer is negligent, that is, if its product was not put together with the ordinary care that a reasonably prudent manufacturer should have used, it should pay for the resulting loss. The contrary rule, that the loss should be borne by the innocent purchaser, is unjust, in our opinion. We therefore hold that the economic-loss doctrine does not bar recovery of economic losses in a negligence action under maritime law. (756 F.2d 653, Pet. A-8).

Having held Pott liable on the basis of negligence, the Court found it "unnecessary to discuss plaintiff's breach-of-warranty theory, which would provide an alternative basis for recovery." (756 F.2d, Fn. 7, 653-4, Pet. A-8, Fn. 7). Accordingly, the Eighth Circuit decision raises only the issue of maritime tort law. No issue of Missouri contract law is involved.

SUMMARY OF ARGUMENT

The decision of the United States Court of Appeals for the Eighth Circuit in this case carefully follows the applicable rulings of this Court.

The two requisites for jurisdiction in admiralty were present: marine locality and a significant relationship to maritime activity. It was undisputed that the fractures of the steam coils in the four tank barges built for Ingram occurred after the vessels had been launched and were in service. Moreover, the injury bore a significant relationship to maritime activity since it disabled the barges from being used in maritime commerce to move heavy petroleum products that require heating for unloading.

For about a century, this Court has upheld jurisdiction in admiralty for economic losses. The law is clear that maritime rights will not be limited by the application of state common law doctrines.

There are no "special and important" reasons present in this case to warrant granting the petition for a writ of certiorari. There is no conflict in the circuits. A fair reading indicates that the decision of the United States Court of Appeals for the Third Circuit in *East River Steamship Corp. v. Delaval Turbine, Inc.*, 752 F.2d 903 (1985), that economic losses are not recoverable in admiralty, relates to the doctrine of strict liability. This case (Ingram-Pott) involves an action for negligence; and the decision of the Eighth Circuit proceeds solely on that basis and not on the doctrine of strict liability.

The doctrine of strict liability expanded the liability of a manufacturer or builder to include liability without fault and without privity. However, it is an additional remedy to the traditional tort action in admiralty for negligence. Neither the history nor the rationale of the doctrine of strict liability indicates that it was intended to displace or restrict the right to recover in admiralty for negligence; and the cases so hold.

There is no conflict between the decision of the Third Circuit in the *East River Steamship* case and this case. In addition, the newness of the issue of strict liability and its application to economic losses in admiralty suggest that review be deferred until the issue has matured with the passage of time.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The decision of the Eighth Circuit follows applicable rulings of this Court.

In its petition for a writ of certiorari, Pott attempts to portray the decision in this case as an innovative, precedent-shattering ruling. The reality is much different. An analysis will indicate that the opinion carefully follows the applicable decisions of this Court.

A. The jurisdictional requirements of *Executive Jet Aviation, Inc. v. City of Cleveland* were met.

The familiar two part test enunciated in *Executive Jet Aviation, Inc. v. City of Cleveland, supra,* required that the damage occur on navigable waters and that the wrong bear a significant relationship to maritime activity.

Both Courts below spelled out in detail the manner in which the test was met in this case. The fractures in the heating system occurred while the barges were on the navigable rivers and disabled them from transporting heavy grades of oil in commerce. The four tank barges were equipped with steam heating coils because they were built to move heavy petroleum products which required heating for unloading.

It is specious for Pott to suggest, as it has from the outset, that the injury was not maritime related because it did not affect the ability of the tank barges to navigate. Seaworthiness of a vessel is a major theme of admiralty. The term relates to the suitability of a vessel to perform its assigned task. As the Eighth Circuit stated in the Opinion:

> Without functioning heating-coil systems, the barges could not be used effectively to haul heavy petroleum products that require heating before unloading. (756 F.2d 651, Pet. A-4)

The two ingredients required for jurisdiction in admiralty were clearly present. *Jig the Third Corporation v. Puritan Marine Insurance Underwriters Corporation,* 519 F.2d 171 (5th

Cir. 1975), cert. denied, 424 U.S. 954 (1976); *Jones v. Bender Welding and Mach. Works, Inc.*, 581 F.2d 1331 (9th Cir. 1978); *Pan Alaska Fisheries, Inc. v. Marine Construction and Design Company,* 565 F.2d 1129 (9th Cir. 1977); *In re Motor Ship Pacific Carrier,* 489 F.2d 152 (5th Cir. 1974), cert. denied sub nom *Union Camp Corp. v. Gypsum Carrier, Inc.*, 417 U.S. 931 (1974).

Pott's suggestion that the decision conflicts with the ruling of this Court that a contract to build a vessel is not a maritime agreement, misses the mark. As the Eighth Circuit noted in its opinion, "the splits occurred after the barges had been launched." (756 F.2d 651, Pet. A-4). A tort occurs when the damage is sustained. Here, the damage occurred at the time of the splits and fractures, which took place after the vessels had been built and launched and were in service. The Eighth Circuit opinion was based on tort - not on contract; on negligence and not on strict liability.

B. There is admiralty jurisdiction of causes of action for damage for economic loss.

In affirming Ingram's right to recover the expense of repairing and replacing the fractured coils, the Eighth Circuit broke no new ground. For a century, the rulings of this Court have sustained jurisdiction in admiralty for the recovery of economic losses. *The Potomac,* 105 U.S. 630, 26 L.Ed. 1194 (1882); *The Conqueror,* 166 U.S. 110, 17 S.Ct. 510 (1897). Shipping has a dominant commercial flavor; and economic losses are not demoted to junior status. They are no less threatening to vessel operation than other types of damage or injury. Indeed, this is the basis of the doctrine of maritime liens, enabling the owner to keep his vessel moving, using it as security to finance the cost of repairs and supplies.

Accordingly, the decisions hold that jurisdiction exists in admiralty for causes of action against manufacturers or builders, where the only damage sustained by the purchaser was to the property purchased. *Jig the Third Corporation v. Puritan*

Marine Insurance Underwriters Corporation, supra; Miller Industries v. Caterpillar Tractor Co., 733 F.2d 813 (11th Cir. 1984); *Houston-New Orleans, Inc. v. Page Engineering Company,* 353 F.Supp. 890 (E.D. La. 1972); *Berg v. General Motors Corporation,* 87 Wash 2d 584, 555 P.2d 818 (1976).

In *Jig the Third,* the Court rejected the argument Pott makes here that, since the only damage suffered was to the vessel itself, the owner could not maintain an action in maritime tort. The Court quoted with approval Dean Prosser's comment:

> There can be no doubt that the seller's liability for negligence covers any kind of physical harm, including not only personal injuries but also property damage to the defective chattel itself. W. Prosser, The Law of Torts, Section 101 at 665-66 (4th Edition 1971). 519 F.2d 175.

The Court went on to say that numerous recent cases have so held. In *Jig the Third,* the owner suffered the loss of the vessel; in the instant case, Ingram, the owner, suffered the loss of the steam coils.

C. State Law will not be applied to narrow or destroy substantive maritime rights.

Pott contends that this case in admiralty should be governed by the State of Missouri common law rule stated in *R. W. Murray Co. v. Shatterproof Glass Corp.,* 697 F.2d 818 (8th Cir. 1983) that economic losses caused by negligence are not recoverable. The argument that admiralty law should embrace state common law doctrines comes late in the day. Decisions of this Court have established the rule that state law will not be applied in admiralty to defeat or narrow substantive maritime rights of recovery. Thus, the Court has refused to impose the common law rules relating to contributory negligence (*Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406 (1953); or releases to maritime claims (*Garrett v. Moore-McCormack Co.,* 317 U.S. 239, 243-246 (1942); or state statutes of frauds to maritime con-

tracts (*Kossick v. United Fruit Co.*, 365 U.S. 731 (1961). The common law cases cited in Pott's petition including Appendix D are irrelevant at best. Once admiralty jurisdiction has been established, the substantive rules and precepts of admiralty become applicable in the interest of uniformity.

II. The Supposed Conflict In The Circuits Does Not Warrant Granting The Writ.

Petitioner suggests, as a basis for review, a purported conflict involving the decision of the Third Circuit in *East River Steamship Corp. v. Delaval Turbine, Inc.*, 752 F.2d 903 (1985). In that case, the Court ruled that damage due to a defective product is not actionable in tort unless the defective product harms or creates an unreasonable risk of harm to persons or property other than the product itself.

There are no "special and important" issues for this Court to consider. There is no square conflict in the circuits or with this case; and the newness of the issue cautions delaying judicial review, in any event. *East River* involves five counts, four of which are in strict tort liability and only one is in negligence. With the exception of the fifth count (asserted only by Richmond Tankers), plaintiffs withdrew their negligence claims, and those claims were dismissed with prejudice by the District Court. Accordingly, a fair reading of the opinion in *East River* shows that it deals with principles related to the doctrine of strict liability, not negligence, which was the basis for the decision in the Ingram — Pott case.

Indeed, in its petition, Pott acknowledges the limited nature of the purported conflict. In a footnote on page six, Pott states that the Fifth, Ninth and Eleventh Circuit decisions "do not conflict" with the *East River* decision and claims only that "in reality there is a clear cut split between the Eighth and Third Circuits on the substantive admiralty issue presented by this Petition."

Despite Pott's assertions to the contrary, this case simply involves the ordinary question of whether Pott was guilty of fault and should bear the burden of its wrongdoing. The decisions of the Courts below, in the instant case, after consideration of all the evidence, reached a fair and just result.

A. The supposed conflict related to strict liability—not negligence; and strict liability is not an issue in this case.

Negligence and strict liability stand in marked contrast with respect to both the rationale and basis for imposing liability. Pott seeks to engraft the rules taken from the doctrine of strict liability onto the doctrine of negligence, where they are inapposite.

The responsibility of the manufacturer or builder of a product has been expanded under the doctrine of strict liability in two major areas; there is liability (1) without fault to users or consumers and (2) with no requirement of privity. Strict liability applies — although "(a) the Seller has exercised all possible care in the preparation and sale of his product and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller." (Restatement (Second) of Torts, Section 402(A)(2)(a) and (b)).

The Restatement (Second) of Torts indicates that these changes "represented a departure from, and an exception to, the general rule that a supplier of chattels was not liable to third persons in the absence of negligence or privity of contract." (*Ibid,* Comment b).

> The justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who

> may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products. (*Ibid,* Comment c).

Courts have, of course, noted the difference between strict liability and negligence. In *Lindsay v. McDonnell Douglas Aircraft Corporation,* 460 F.2d 631, 637 (1972), the Eighth Circuit said:

> Negligence requires a different standard and quantum of proof than does strict liability in tort.

In *Emerson G.M. Diesel v. Alaskan Enterprises,* 732 F.2d 1468, 1473 (1984), the Ninth Circuit observed that, under a negligence theory, plaintiff must show defendant's "failure to adhere to an accepted standard of conduct." Under strict liability, plaintiff "must show that the product was defective and that the product was used in a reasonably foreseeable way."

In the cases imposing strict liability, questions were raised as to whether it was fair to hold a seller liable without fault and without privity if the product was not unreasonably dangerous and as to the expense of insurance if the risks covered included economic or qualitative losses. However, as the Restatement makes clear, these concerns did not apply to cases involving negligence.

> The rule stated here is not exclusive and does not preclude liabilities based upon the alternative ground of negligence

> of the seller, where such negligence can be proved." (Restatement (Second) of Torts, Section 402A, Comment a.)

If the builder was negligent, it would not be unfair to require that he pay for the resulting damage. Moreover, proof of fault would require evidence showing the existence of an obligation or duty of care. The expense of insuring such a risk, limited in this manner, could properly be regarded as a cost of doing business. At least in the case of a reasonably prudent manufacturer or builder, the expense would be manageable.

Negligence was the sole basis upon which the Eighth Circuit decided this case. As the opinion stated:

> We think the better reasoning supports allowing recovery in tort, at least where, as here, there is a finding of actual negligence, as opposed to a mere defect not resulting from any lack of care. If a manufacturer is negligent, that is, if its product was not put together with the ordinary care that a reasonably prudent manufacturer should have used, it should pay for the resulting loss. The contrary rule, that the loss should be borne by the innocent purchaser, is unjust, in our opinion. (756 F.2d 653, Pet. A-8).

Moreover, the law is clear "that the seller's liability for negligence covers any kind of physical harm, including not only personal injuries but also property damage to the defective chattel itself" (Prosser, *Law of Torts* (Fourth Edition, 1971), Section 101, p. 665).

For Pott to label the damage as "only economic loss" does not make the expense of repair and replacement (in this instance $361,757.00) less burdensome to Ingram, the innocent purchaser.

B. There is no square conflict in the circuits.

In its petition, Pott undertakes to distinguish the many decisions upholding admiralty jurisdiction to award damages for

economic losses. In doing so it makes clear that there is not only no conflict in the circuits warranting review by this Court, but there is no principle involved to justify restricting rights of recovery for negligence in admiralty.

In *Jig the Third, supra,* the defect in the shaft and shaft assembly caused severe leakage which sank the vessel. Accordingly, Pott insists there was damage to property other than the product itself. (Pet. 8). However, as the Eleventh Circuit explained with respect to *Jig the Third:*

> The term 'physical damage' in this context, however, is a term of art contemplating an accident 'involving some violence or collision with external objects'...(*Miller Industries v. Caterpillar Tractor Co.,* 733 F.2d 813, fn. 6, 817).

Accordingly, the damage in *Jig the Third* did not constitute physical damage any more than did the sun gear in *Miller Industries.* The Court characterized both the defective shaft in *Jig the Third* and the defective sun gear in *Miller Industries* as "economic loss" for which recovery of damages resulting from negligence was awarded in admiralty. *Miller Industries, supra,* fn. 7, p. 818. Similarly, the Eighth Circuit characterized the faulty steam coils in the Ingram barges as an economic loss.

In the same vein, Pott attempts to distinguish other cases. *Miller Industries v. Caterpillar Tractor Co., supra,* and *Jones v. Bender Welding and Machine Works, Inc., supra,* involve negligent failure to warn of product defects. (Pet. 9) *Carbone v. Ursich,* 209 F.2d 178 (9th Cir. 1953) and *Emerson G.M. Diesel v. Alaskan Enterprises, supra,* deal with special situations relating to fishermen. (Pet. 10). *Union Oil Co. v. Oppen,* 501 F.2d 558 (9th Cir. 1974) involves harm to acquatic life from an oil spill. (Pet. 9-10). Pott observes that somehow "a tort law remedy was not appropriate" when the defect caused by negligence results in damage in the nature of a leaking steam coil.(Pet. 7).

Why a maritime tort action is not appropriate when the damage consists of fractured steam coils but is in order when a boat's steel plate is fractured in a collision is not made clear. Nor does Pott explain why it does not object to admiralty jurisdiction in *Jig the Third* when the vessel went to the bottom of the river as a result of the failure of the defective shaft but views it with alarm when the four Ingram tank barges proceeded to the shipyard for repairs and replacement, by reason of steam coil fractures as a result of inadequate design, defective materials and failure to test.

In attempting to distinguish the numerous decisions in admiralty awarding damages for economic loss, Pott is engaging in an exercise in casuistry. The decisions upholding jurisdiction in admiralty for the recovery of damages caused by negligence of a shipbuilder represent traditional admiralty remedies. Shipping is a dominantly commercial operation. Avoidance of economic damage and loss is a major concern. Strict liability is a doctrine recently incorporated into admiralty law. However, it has been included, where applicable, as an additional remedy. Neither history nor reason suggest that it has displaced or curtailed the tort remedy for negligence in admiralty.

C. Newness of issue suggests delay in review.

This Court has indicated the desirability of allowing issues to mature in reviewing conflicting decisions (*E.I. duPont de Nemours & Co. v. Train,* 430 U.S. 112, 135 n. 26 (1977); and individual members of the Court have expressed the same opinion. William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload,* 66 Judicature 230 (1983). With the passage of time, there are additional cases and opinions, differing views and factual situations, which help illuminate the problem before it is finally resolved. Justice Brennan quoted with approval, the comment of Justice Stevens: "The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result." (*Supra,* 233).

The *East River* decision was rendered in 1985. Judicial rulings on the remedy of economic losses and damages in admiralty actions based on strict liability are few and of recent vintage. It is submitted that *East River* and *Ingram* are not in conflict. *East River* is based on recovery of economic loss under strict liability, a new concept in admiralty; *Ingram* is based on recovery of economic loss under negligence which is a recognized right in admiralty. In any event, consideration of the problem by this Court should be deferred.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondent suggests that there is no conflict between the opinion below and that of the Third Circuit in *East River Steamship Corp. v. Delaval Turbine, Inc.*, 752 F.2d 903 (3d Cir. en banc), *cert. pending*, No. 84-1726 (May 13, 1985) because the former involved only a negligence claim and the latter only a strict liability claim. This is incorrect. *East River* involved both strict liability and negligence claims, as the opinion and the petition for certiorari make clear. *Id.* at 908; Petitioner's Brief for Certiorari at 18-21, No. 84-1726.

Moreover, until the decision below, the courts have never treated the two theories of recovery differently for purposes of application of the economic loss doctrine. Indeed, the com-

peting policy considerations are between the need for *any* tort remedy (whether negligence or strict liability) in view of the availability of an unquestioned contractual remedy. As the Third Circuit said in the *East River* case:

> Our reasoning in this case is equally applicable to products liability cases brought in negligence and those brought in strict liability. . . . One of the cases we rely upon . . . , *Seely v. White Motor Co.*, 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965), involved negligence as well as strict liability claims, and the court in that case did not distinguish between the two theories in applying the rule against recovery of damages where an unreasonable risk of harm is not present.

Id. at 908 n. 2.

The direct conflict between the opinion below is clear. It is further highlighted by the fact that a petition for a writ of certiorari is now pending in *East River* seeking review of the identical question presented in this case. *East River Steamship Corp. v. Delaval Turbine, Inc.*, No. 84-1726 (filed May 13, 1985). This Court has previously said that it is a "constitutionally based principle" that the federal admiralty law should be uniform throughout the country. *Moragne v. States Marine Lines*, 398 U.S. 375, 402 (1970). The fact that the courts of appeals have been faced with this issue in one form or another four times in one year[1] demonstrates that it is a significant and recurring question requiring a definitive resolution by this Court at this time.

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[1] In addition to this case and *East River* in 1985, the economic loss doctrine was raised in 1984 in *Emerson G. M. Diesel v. Alaskan Enterprise*, 732 F.2d 1468 (9th Cir. 1984) and *Miller Industries v. Caterpillar Tractor Co.*, 733 F.2d 813 (11th Cir. 1984), as discussed in Pott's Petition for Certiorari at pp. 8-10.

CONCLUSION

The petitions for writs of certiorari in this case and in *East River* should be granted. The cases should be consolidated for argument to enable the Court to hear all viewpoints and finally resolve the split in the circuits with respect to the substantive admiralty law issues presented by the pending petitions.

Respectfully submitted,

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No. 85-12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

POTT INDUSTRIES INC.,
Petitioner,

vs.

INGRAM RIVER EQUIPMENT, INC.,
Respondent.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

On October 7, 1985, the Court granted the petition for a writ of certiorari (No. 84-1726) filed from the Third Circuit in *East River Steamship Corp. v. Delaval Turbine, Inc.*, 752 F.2d 903 (3d Cir. en banc 1985). No action was taken on the pending writ in this case. The principal substantive question raised in *East River* and in this writ is whether purely economic losses caused by a defective product can be recovered in a tort action under federal maritime law. We presume the Court decided to defer action on this writ on the premise that its opinion in *East River* would ultimately be dispositive of this case.

We are filing this supplemental brief to point out that *East River* may not necessarily be dispositive of the foregoing substantive question. To insure resolution of the issue, we suggest the Court reconsider and grant this writ and consolidate this case and *East River* for argument.

Unlike This Case, East River May Be Governed By Robins Dry Dock

In *East River* the plaintiffs are bare boat charterers of four supertankers who seek recovery in tort for economic losses caused by allegedly defective turbines designed and manufactured by the defendant. No direct contractual relationship between the charterers and the manufacturer is alleged and the charterers are seeking damages for "down time" and repair costs. 752 F.2d 903, 905.

For these reasons, even though not mentioned in either the opinion of the Third Circuit or the petition for a writ of certiorari, the facts presented by *East River* may be governed by this Court's decision in *Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303 (1927).

In *Robins Dry Dock,* plaintiff was a charterer who sued a dry dock operator for down or lost time caused by the negligent repair of the chartered vessel. The Court unanimously held that a charterer had no remedy in either tort or contract because the dry dock operator was responsible to owner with whom it contracted, not the charterer. Mr. Justice Holmes wrote:

> ...no authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. 275 U.S. 309.

If the Court concludes that *Robins* has continued vitality, then it could affirm or remand *East River* on the basis that plaintiff charterers have no contract or tort remedy against the manufacturer of a defective part sold to the owner of the vessel unless they can prove the manufacturer was, at least, aware of the charter. Such a decision would leave the substantive question of whether purely economic losses caused by a defective product can be recovered in a tort, as distinguished from contract, action in admiralty unresolved.

The instant case, on the other hand, presents a situation where the plaintiff and defendant had a direct contractual relationship pursuant to which the plaintiff has a recognized remedy for breach of warranty. In addition, the plaintiff was permitted by the court below to maintain a maritime tort action — negligence — to recover its economic losses — the cost of repairs. The other cases in the circuit courts which have dealt with this issue also involved a suit between the owner and the manufacturer of the defective product, where the plaintiff had recognized remedies for either breach of contract or breach of warranty. *See Miller Industries v. Caterpillar Tractor Co.*, 733 F.2d 813 (11th Cir. 1984); *Emerson G. M. Diesel v. Alaskan Enterprise*, 732 F.2d 1468 (9th Cir. 1984); *Jig The Third Corp. v. Puritan Marine Ins. Underwriters Corp.*, 519 F.2d 171 (5th Cir. 1976), *cert. denied*, 424 U.S. 954 (1976).

CONCLUSION

The most significant and recurring unanswered substantive question in this area is the availability of a tort remedy in admiralty for purely economic losses caused by a defective product. This question will not necessarily be resolved in *East River* because that case is arguably governed by the *Robins Dry Dock* decision. Accordingly, Petitioner Pott Industries Inc. respectfully suggests that a writ of certiorari issue to the United States Court of Appeals for the Eighth Circuit to insure resolution of all aspects of the economic loss doctrine in admiralty by this Court at this time.

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On Petition For A Writ of Certiorari to the
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The Conqueror, 166 U.S. 110, 17 S.Ct. 510 (1897) 2

The Potomac, 105 U.S. 630, 26 L.Ed. 1194 (1882) 2

Other Authority:

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On Petition For A Writ of Certiorari to the
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SUPPLEMENTAL BRIEF FOR RESPONDENT

Respondent Ingram River Equipment, Inc. files this response to the new brief of Petitioner Pott Industries, Inc., denominated as "Supplemental Brief" while the Petition for Writ of Certiorari is pending in this matter.

Pott's Supplemental Brief was presumably filed under the authority of Rule 22.6 which provides: "Any party may file a Supplemental Brief at any time while the Petition for Writ of Certiorari is pending calling attention to new cases or legislation or other intervening matter not available at the time of the party's last filing." The rule is designed to encourage parties to bring to the Court's attention new developments of which it might not otherwise be aware. Since the only new element suggested in Pott's Supplemental Brief is the granting of certiorari in *East River Steamship Corp. v. Delaval Turbine, Inc.*, 752 F.2d 903

(3rd Cir. en banc 1985) *cert. granted,* No. 84-1726 (October 7, 1985), this Court did not require prompting from the parties as to its own actions.

In fact, Pott in its brief only emphasizes the differences betwen *East River* and the instant case, which Ingram has already pointed out in its Brief in Opposition to the Petition for Certiorari (pp. 10-15): that the cases involve different theories of tort liability and different standards of proof. *East River* was decided on the basis of strict liability, a relatively new tort theory in admiralty, and involved the issue of economic loss in that context. *Ingram - Pott,* however, was decided by the Courts below on the basis of negligence. Ingram bore the burden of proving that Pott was a wrongdoer (not necessary in strict liability), requiring that it be responsible for its negligence.

That economic loss is recoverable if caused by negligence is, in fact, a well established doctrine in admiralty recognized by this Court for the past hundred years. *The Potomac,* 105 U.S. 630, 26 L.Ed. 1194 (1882); *The Conqueror,* 166 U.S. 110, 17 S.Ct. 510 (1897).

Pott now urges another difference between *East River* and the instant case, by its suggestion that *East River* may be ruled and governed by *Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303 (1927). *Robins* held that a tortfeasor who damaged the property of another did not incur liability to a third party sustaining loss as a result, because of a contract, unknown to the doer of the wrong, between the third party and the owner of the damaged property. The suggested additional difference merely emphasizes the fact that the *East River* and *Ingram - Pott* cases involve substantially different issues.

Pott indulges the facile assumption that this Court overlooked the possibility that *Robins* might determine the outcome of the *East River* case. It is perhaps more reasonable to assume that this Court did recognize the difference between *East River*

and *Ingram - Pott,* which Ingram pointed out in its original brief, and decided, for that reason, that the cases should not be consolidated.

CONCLUSION

It is submitted that Pott's Supplemental Brief further emphasizes the differences between *East River* and *Ingram-Pott* and that the Petition for a Writ of Certiorari in the Ingram - Pott case should be denied.

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